January 21, 2000

I want to cancel/dismiss

the following lawsuits

~~00CV00784~~ 00CV00784 Walker vs Palmer

00CV00974K Walker vs Chem. Richardson

Because of a Con Job

I Believe has taken place

against me without my knowledge.

intentionally with malice.

also cancel affidavit of financial

status.

Gwendolyn J Walker
612 E. 32nd Pl. N.
Tulsa, Okla. 74106
918-425-6475

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICKY SIMMONS,

Petitioner,

vs.

RON CHAMPION, Warden,

Respondent.

Case No. 99-CV-472-B (E)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 27th day of Jan, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 3 1 2000

FILED
JAN 3 1 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF RUTH C. MOORE aka Ruth W. Moore aka Ruth Weldon Moore aka Ruth Moore aka Ruth C. McLellan aka Ruth McLellan aka Ruth W. McLellan, Deceased, et al.,

Defendants.

CIVIL ACTION NO. 99-CV-1030-H (M)

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 26th day of January, 2000.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

PB:css

1-14-00

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JAN 31 2000

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CASE NO. 99CV1077H(M)**
	)	
DAVID A. DAVIS,	)	
	)	
Defendant.	)	

FILED

JAN 31 2000

U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $2,550.81, plus accrued interest of $1,112.26, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the legal rate 5.997 until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and

the further representation of the defendant that David A. Davis will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of February, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $75.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

7. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, David A. Davis, in the principal amount of $2,550.81, plus accrued interest in the amount of $1,112.26, plus interest at the rate of 8% until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 5.997 percent per annum until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney

DAVID A. DAVIS

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID MARVIN BAKER,

Petitioner,

vs.

L. L. YOUNG,

Respondent.

ENTERED ON DOCKET
DATE JAN 31 2000

Case No. 99-CV-135-H (J)

FILED
JAN 31 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on October 20, 1999 (Docket #7), in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Respondent's motion to dismiss for failure to exhaust state remedies (#4) be granted, and Petitioner's petition for a writ of habeas corpus be dismissed without prejudice. None of the parties has filed an objection to the Report and the time for filing an objection has passed. The Court further notes that no mail from the Court to Petitioner has been returned.

Having reviewed the Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (#7) is **adopted and affirmed**.
2. Respondent's motion to dismiss for failure to exhaust state remedies (#4) is **granted**.

3. The petition for a writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED.

This 26TH day of January, 2000.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID MARVIN BAKER,

Petitioner,

vs.

L. L. YOUNG,

Respondent.

ENTERED ON DOCKET
DATE JAN 31 2000

Case No. 99-CV-135-H (J)

FILED
JAN 31 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed without prejudice to refiling same, for failure to exhaust state remedies.

IT IS SO ORDERED.

This 26TH day of JANUARY, 2000.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICKY SIMMONS,

Petitioner,

vs.

RON CHAMPION, Warden,

Respondent.

Case No. 99-CV-472-B (E)

ORDER

Before the Court in this 28 U.S.C. § 2254 habeas corpus action are Respondent's motion to dismiss for failure to file within the limitations period (Docket #3), Petitioner's motion for summary judgment (#5), and Petitioner's motions for entry of default judgment against Respondent (#s 8 and 9). Petitioner has filed a brief in support of his motion for summary judgment wherein he responds to Respondent's motion to dismiss (#6). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted. Petitioner's motions for summary judgment and for entry of default judgment should be denied.

BACKGROUND

According to the Judgment and Sentences entered in the state district court (#1, copies

attached as Exs. A, B and C),[1] Petitioner was convicted on his plea of guilty on November 13, 1989, of Possession of a Controlled Drug With Intent to Distribute, AFCF (Count I); Possession of Marijuana With Intent to Distribute, AFCF (Count II); and Maintaining Dwelling House Where Controlled Drugs are Kept, AFCF, in Tulsa County District Court, Case No. CF-89-1296. On November 14, 1989, Petitioner was sentenced to twenty (20) years imprisonment on each count, to be served concurrently. (#1, Ex. E). Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal.

The record provided by Respondent indicates that on January 3, 1992, Petitioner filed his first application for post-conviction relief in the state district court. On January 21, 1992, that court denied the requested relief. Petitioner did not file a post-conviction appeal. See #4, Ex. A at 2.

Thereafter, Petitioner filed a second application for post-conviction relief. On March 2, 1993, the state district court denied post-conviction relief (#4, Ex. A). Although Respondent asserts that Petitioner again failed to file an appeal, the Court notes that the OCCA's docket shows that Petitioner "Rickie" D. Simmons filed a post-conviction appeal on April 2, 1993 and that the OCCA affirmed the district court's denial of post-conviction relief on April 27, 1993.

In his petition, Petitioner describes his more recent efforts to obtain collateral relief in the state courts. See #1 at 2-4. Respondent did not provide a record of these more recent efforts by Petitioner to challenge his convictions and sentences. According to Petitioner, he has sought relief in the Oklahoma Court of Criminal Appeals ("OCCA") for denial of CAP credits via a mandamus action. Petitioner states the OCCA declined jurisdiction on December 23, 1998. In addition,

[1]The Court notes that on the Judgments and Sentences provided by Petitioner, Petitioner's first name is spelled "Rickie." In his petition, however, Petitioner spells his first name "Ricky."

Petitioner states he filed a petition for writ of mandamus in Tulsa County District Court where the requested relief was denied on February 23, 1999. Petitioner appealed that denial to the OCCA where the extraordinary relief requested was denied on March 29, 1999. Petitioner also indicates he filed a "motion for order to control further proceedings" in Tulsa County District Court where relief was denied on March 16, 1999. Petitioner appealed to the OCCA where relief was denied on June 1, 1999.

On June 21, 1999, Petitioner filed the instant petition for writ of habeas corpus(#1).

ANALYSIS

A. Respondent's motion to dismiss

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's conviction become finals, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitations does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing state applications for post-conviction relief properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on November 24, 1989. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a

timely petition for writ of habeas corpus.

Although the running of the limitations period would be tolled or suspended during the pendency of any post-conviction or other collateral proceeding with respect to the pertinent judgment or claim properly filed during the grace period, 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226, none of Petitioner's post-conviction or other collateral proceedings was filed in the state courts during the grace period. The post-conviction applications identified by Respondent were filed and resolved almost three (3) years prior to enactment of the AEDPA. The mandamus and other collateral proceedings identified by Petitioner in his petition were not commenced until more than one year after expiration of the grace period. See Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998) (stating that a collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations). Therefore, the Court concludes that the limitations period was not tolled as a result of the pendency of any of Petitioner's post-conviction, mandamus or other collateral review proceedings.

Petitioner did not file his federal petition until June 21,1999, more than two (2) years beyond the April 23, 1997 deadline. Therefore, absent a basis for either statutory or equitable tolling, this action is time-barred.

In his brief in support of motion for summary judgment (#6), Petitioner responds to the motion to dismiss by asserting that "the judgment of the state court has never become final. Because the trial court misinformed him of his right to seek withdrawal of the negotiated plea of guilty." (#6 at 1). Petitioner believes that because he "has never had a direct appeal," his conviction has not become final for purposes of § 2244(d). However, the Court disagrees. As stated above, Petitioner's conviction became final in this case ten (10) days after entry of his judgment and sentence. See Rule

4.2(A), *Rules of the Court of Criminal Appeals*. After enactment of the AEDPA, Petitioner had until April 23, 1997 to file his federal petition for writ of habeas corpus. Petitioner failed to meet that deadline and has not provided a basis for either statutory or equitable tolling of the § 2244(d) limitations period. Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

B. Petitioner's motions for summary judgment and for default judgment

Petitioner requests entry of summary judgment against Respondent based on Respondent's alleged failure to "show cause why the writ should not issue as ordered on July 7, 1999." (#5). However, the Court's July 7, 1999 Order (#2) provided that "[a]s an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to 28 U.S.C. § 2244, failure to comply with the 1-year limitations period, or lack of jurisdiction." Respondent complied with the Court's Order by filing a motion to dismiss based on the alleged untimeliness of the petition. Petitioner's motion for summary judgment lacks an arguable basis in law and is, therefore, frivolous. See Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991). As a result, the Court finds no basis for entry of summary judgment as requested by Petitioner and concludes the motion should be denied.

Petitioner's motions for entry of default judgment against Respondent are premised on Respondent's failure to respond to the motion for summary judgment. Pursuant to this Court's local rules, where a party has failed to respond to a dispositive motion, the Court has discretion to enter the relief requested, see N.D. LR 7.1(C), if the facts justify entry of judgment for failure to prosecute. In the instant case, however, the facts do not justify entry of judgment against Respondent for failure

to prosecute. As a result, the Court finds, in its discretion, that Petitioner's motions for default judgment should be denied.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period, see Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998); United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#3) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's motion for summary judgment (#5) is **denied**.
4. Petitioner's motions for default judgment (#s 8 and 9) are **denied**.

SO ORDERED THIS 27th day of Jan., 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

JW 1-19

FILE

JAN 28 2000

Phil Lombardi, Cle
U.S. DISTRICT COUR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

MEMORIAL PARK CEMETERY ASSOCIATION,

Defendant.

NO. 99-CV-049-B(E)

ENTERED ON DOCKET
DATE JAN 31 2000

CONSENT DECREE

This Consent Decree is made and entered into between the plaintiff, the Equal Employment Opportunity Commission ("EEOC"), and the defendant, Memorial Park Cemetery Association (hereinafter collectively referred to as "the parties").

On January 19, 1999, the Equal Employment Opportunity Commission instituted a lawsuit in the United States District Court for the Northern District of Oklahoma, Tulsa Division, Civil Action Number 99-CV-049-B(E) against defendant, alleging that the defendant violated the Age Discrimination in Employment Act (ADEA) when it discharged Truman Replogle because of his age, 70, pursuant to a mandatory retirement policy created by Defendant requiring the retirement of employees at age 70.

The parties hereto desire to compromise and settle the differences embodied in the aforementioned lawsuit, and intend

that the terms and conditions be set forth in this Consent Decree.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby acknowledged, the parties agree as follows, the court finds appropriate, and therefore, it is ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction to enforce the provisions set forth in this Consent Decree.

2. This Consent Decree resolves all issues, including all like and related issues, raised in the EEOC Charge Number 311971013. This Decree further resolves all issues in the complaint filed by the Commission in this civil action. The Commission does not waive processing or litigating charges other than the above-referenced charge.

a. It is understood that this Agreement does not constitute an admission by defendant of any violation of the Age Discrimination in Employment Act of 1967, as amended.

b. This Agreement constitutes a full release of all claims Truman Replogle may have regarding the matters raised in these charges.

3. Defendant agrees not to discriminate on the basis of

age with respect to recruitment, hiring, termination, or any other employment action, and defendant further agrees not to retaliate in any way against Mr. Repologle or any other person because of opposition to any practice declared unlawful under the ADEA or because of the filing of a charge, giving testimony, or assisting or participating in any manner in any investigation, proceeding or hearing.

4. Defendant agrees to continue to post its written EEOC complaint procedure policy.

5. Defendant agrees to conduct training for its supervisors and managers advising them of the requirements and prohibitions against age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"). The training will inform employees of the complaint procedure and will advise employees of the consequences of violating the ADEA. The training shall be at least 45 minutes in duration and shall be conducted on or before March 15, 2000. No less than 10 days before the training is conducted, Defendant agrees to give writen notice to the EEOC as to the date and location of the training, the name of the person providing the training and the substance of the training.

6. Defendant agrees to eliminate from any and all employment files pertaining to Truman Replogle, documents and entries relating to the facts and circumstances surrounding his

discharge, the filing of the charge, or the settlement of the claim.

7. Defendant agrees to immediately cease its mandatory age 70 retirement policy and post a notice to its employees reflecting this change in policy. Defendant agrees to inform the EEOC that it has fulfilled this requirement and provide a copy of the notice within seven (7) days of the execution of this Consent Decree by the Court.

8. Defendant agrees to reinstate Truman Replogle to the position of Lay-Out Man Consultant with the following terms:

a. Mr. Replogle shall be reinstated by the Defendant for a period of two (2) years beginning immediately after the entry of this Consent Decree by the Court. After the two (2) year reinstatement period, Mr. Replogle will no longer be employed with Defendant;

b. Mr. Replogle shall be paid an annual salary of $26,249.60 to be paid to Mr. Replogle every two weeks. Mr. Replogle's wages shall be subject to appropriate state and federal tax withholdings;

c. Mr. Replogle shall be an employee "on call" which means that he shall be called in to work by Defendant when his services are deemed necessary.

Mr. Replogle shall work no more than 40 hours per week between the hours of 9:00 a.m. to 5:00 p.m., Tuesday through Saturday, for the entire reinstatement period of two (2) years. Mr. Replogle will not be called in to work on Sundays and Mondays. Mr. Repologle shall receive his full-time salary as referenced in paragraph no. 8(b) above for the entire reinstatement period of two (2) years regardless of how many hours he is called in to work or which he actually works. However, during the two (2) year reinstatement period, Defendant shall cease payment of Mr. Replogle's salary if (i) Mr. Replogle dies; or (2) if Mr. Replogle is physically unable to perform the essential functions of his job as outlined in the Job Description appended as Attachment "A" with or without a reasonable accommodation consistent with the requirements of the Americans With Disabilities Act.

d. In lieu of Defendant covering Mr. Repologle and his wife under its health insurance plan, Defendant shall pay the sum of $480.00 per year to Mr. Replogle for the entire reinstatement period

of two (2) years to cover Mr. and Mrs. Replogle's health insurance premiums.

The anticipated value of this portion of the settlement is $53,459.20, including the monetary value of the health insurance payments Mr. Replogle will receive as described in paragraph no. 8(d) above.

9. Defendant further agrees to pay Truman Replogle a total gross sum of $49,000.00. This sum shall be paid to Mr. Replogle within 21 days of the execution of this Consent Decree by the Court. This sum is separate and apart from the amount of wages to be paid to Mr. Replogle pursuant to paragraph no. 8 above

a. The payment shall be made in the form of a cashier's check, payable to the claimant. The check shall be mailed to the claimant by certified mail, return receipt requested to the following address:

Truman Replogle
1608 River Park
Wagoner, OK 74407

b. A copy of the check and the certified mail return receipt should be sent to the attention of Devika S. Dubey at EEOC, 207 S. Houston St., Dallas, Texas 75202, within 14 days after the payment is

made.

10. If defendant fails to tender payment under paragraph no. 9 above or otherwise fails to timely comply with the terms of this agreement, defendant shall pay interest at the rate calculated pursuant to 26 U.S.C. Section 6621 (b) on any untimely or unpaid amounts.

11. The parties agree to bear their own costs associated with this action, including attorney's fees.

12. The Commission has the right to specifically enforce the terms of this Decree. Nothing in this Consent Decree can preclude further actions by the EEOC or any other person to remedy any other alleged violations of the ADEA by defendant.

13. The Court shall retain jurisdiction of this action for a two-year period of time following the entry of this Consent Decree by the Court. At the end of this two-year period, this Decree will expire.

APPROVED AS TO FORM AND CONTENT:

FOR THE PLAINTIFF,
THE UNITED STATES
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION:

ROBERT A. CANINO
REGIONAL ATTORNEY
Oklahoma State Bar No. 011782

DEVIKA S. DUBEY
Senior Trial Attorney
Hawaii State Bar No. 005599

FOR THE DEFENDANT,

KIMBERLY LAMBERT LOVE
Boone, Smith, Davis,
Hurst & Dickman
100 West Fifth Street
Tulas, OK 74103

SO ORDERED, ADJUDGED AND DECREED this 27th day of Jan., ~~1999.~~ 2000

The Honorable Thomas R. Brett,
Chief Judge
UNITED STATES DISTRICT COURT

1-27-2000
Date

Memorial Park

BURIAL PARK - MAUSOLEUM

5111 S. MEMORIAL DR / TULSA, OK/ 74145-8002/627-0220/FAX 627-0258 - NON-SECTARIAN PERPETUAL CARE

LAYOUT POSITION

Knowledge of skills:

- Basic math and geometry
- Backhoe operation
- Knowledge of cemetery's design
- Basic knowledge of park rules and regulations

Physical requirements:

- Must be able to lift 75 lbs.
- Must be able to push or pull equivalent to individuals body weight
- Must be able to squat and kneel
- Climb ladders
- Good eyesight

Duties:

- Operate heavy machinery
- Layout graves
- Pull canopies
- Designate funeral's path using signs
- Perform entombment's and inurnment's, burials
- Check gravesites for completion and neatness
- Enforce safety rules
- Verification of memorial settings and for neatness and location

ATTACHMENT "A"

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT STATE OF OKLAHOMA

SHELLA IRWIN, individually, and as Parent and next friend of PAIGE ROBERTS,	)
PLAINTIFFS,	)
vs.	) **Case No.: 99-CV-0446-B(M)**
STATE OF OKLAHOMA, ex rel. OOLOGAH-TALALA SCHOOL DISTRICT; CITY OF OOLOGAH; PAT GOGLER, individually and in her official capacity as Principal; and BOB SLAGLE, individually and in his official capacity as Chief of the Oologah Municipal Police Department.	)
DEFENDANTS.	)

ORDER OF DISMISSAL

Before the Court is the Motion to Dismiss of Defendants Town of Oologah and Bob Slagle. The Plaintiffs have failed to respond to the Motion to Dismiss. Pursuant to N.D.LR. 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court, has nevertheless, reviewed the Defendants' Motion to Dismiss and, through an independent inquiry, has determined that the Motion to Dismiss should be granted.

For the reasons stated herein, the Motion to Dismiss of Defendants Town of Oologah and Bob Slagle is granted and all claims in the above-captioned action against Defendants Town of Oologah and Bob Slagle are dismissed.

Thomas R. Brett
JUDGE OF THE DISTRICT COURT

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22

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES V. GRAHAM and CONNIE GRAHAM,

Plaintiffs,

vs.

GROLIER PUBLISHING COMPANY, et. al.,

Defendants.

No. 99-C-1103B(J)

ORDER

Comes on for consideration Plaintiffs' Motion to Remand (Docket #6) in the above-styled case and the Court finds the same shall be granted.

This case was originally filed in Creek County on March 18, 1998, removed to this Court under the case number 98-CV-289 and voluntarily dismissed by Plaintiffs with a Motion to Remand pending. Plaintiffs refiled in Creek County on June 8, 1999, with the only change to their Petition being the amount of damages sought. It was again re-removed by Defendants on July 9, 1999 and again remanded to Creek County for lack of subject matter jurisdiction.

Defendants removed for the third time on December 21, 1999, asserting that subject matter jurisdiction has been confessed by Plaintiffs' failure to timely respond to Requests For Admissions, some of which, if admitted, would

establish Plaintiffs seek in excess of the jurisdictional amount.

One day before removal, on December 20, 1999, at 2:42 p.m., Plaintiffs filed an Application for Extension of Discovery Response Time ("Application"), on which the Creek County Court had not yet ruled. It was therefore docketed as a pending motion before this Court for resolution upon removal. Defendant's either acted upon the assumption that the Creek County Court would have had no choice but to deny the extension and deem the Request for Admissions confessed pursuant to state court discovery rules, or were unaware that an Application had been filed even though they were contacted by counsel for Plaintiffs requesting the extension on the day it was filed. In any event, according to Plaintiffs, the responses to the discovery requests were calendered by Plaintiffs' counsel as not being due until the date on which the extension was sought. Defendants assert they were due four days earlier. The Application states that Plaintiffs' counsel was informed by Defendants' counsel that Defendants would object to any extension and that Defendants intended to remove on the basis of the failure to respond being an admission. After removal, Defendants filed a response to Plaintiffs' Application and it was referred to the assigned Magistrate Judge for resolution in the normal course of events and is set for hearing in early February.

Plaintiffs filed a Motion to Remand on January 20, 2000, in which they assert, at pages 3-4, they "have no intention of enlarging their claim above $74,500 because we want the fair opportunity to recover $74,500 as part of our losses, rather than being unfairly or fraudulently denied the opportunity to recover any damages in federal court."

Defendants have the burden of establishing the amount in controversy to establish subject matter jurisdiction by a preponderance of the evidence. *Barber v. Albertsons*, Inc., 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993).

Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction. This presumption is so strong as to require federal courts to review removed actions on their own, whether or not a motion to remand is filed by defendants. *Laughlin v. Kmart Corp.*, 50 F.3rd 871 (10th Cir. 1995). If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an order for summary remand." 28 U.S.C.§1446.

In reviewing the notice and exhibits in this case, which includes Plaintiffs' Application, the Court takes judicial notice of the fact that state court judges regularly grant extensions of time over objection of opposing counsel, particularly where the result of denying same results in a decision other than on the merits. Strict adherence to rigid rules must be balanced with fairness in the interest of justice by both state and federal courts. Defendants' removal of this action, although technically proper, creates a perception of unfairness in denying the state court tribunal the opportunity to address and control the progression of its cases to trial. In the case at bar, however, the Court need not determine the appropriateness of removal in the face of an unresolved Application for Extension of Time because no matter how the federal or state court rules on the

Application, the case must be remanded based upon the above-referenced representations contained in Plaintiffs' subsequently filed Motion to Remand. The representation negates the subject matter jurisdiction urged by Defendants and should also provide the response, at least in part, which Defendants sought in their discovery requests. The Court notes that the representation may also be considered by the state court as an affirmative waiver by Plaintiffs of damages above the amount stated in the event Plaintiffs attempt to amend their damage claim in the future.

Title 28 U.S.C. §1447(c), effective in November, 1988, entitled "Procedure after removal generally," provides, in pertinent part:

> ". . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal."(emphasis added)

This provision was addressed by the district court for the Northern District of Alabama in *Bailey v. Wal-Mart Stores, Inc.*, 981 F. Supp.1415 (1997).[1] The *Bailey* decision involves a removed action in which plaintiff orally amended her complaint, disclaiming any entitlement to judgment in any amount up to one dollar short of the jurisdictional amount. In that case, the court had also sustained a motion for partial summary judgment eliminating one of plaintiff's claims and plaintiff's pursuit of punitive

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[1]The Court notes an absence of appellate authority on this issue and attributes this to the nonreviewable nature of remand orders based upon lack of subject matter jurisdiction. 28 U.S.C. 1447(d).

damages. The court remanded three days before trial, finding the amendment to §§ 1447(c) and (e) for the first time provided the federal courts grounds on which to remand beyond the original determination of jurisdiction at the time of removal. Section (c) deals with subject matter jurisdiction while §(e) deals with the effect of joinder of additional defendants whose joinder defeat diversity.

This result recognizes the fundamental doctrine that federal district courts are courts of limited jurisdiction and that the parties rights in removed actions regarding choice of forum are not on equal footing. Uncertainties are to be resolved in favor of remand. *Burns v. Windsor Ins.* Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

The Court concludes it is without subject matter jurisdiction to proceed in this matter because of Plaintiffs' assurance that the total amount of damages sought in no event will exceed the jurisdictional sum of $75,000. Accordingly, the case should be remanded to the District Court of Creek County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Creek County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 31ST DAY OF JANUARY, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DWIGHT W. BIRDWELL, and BARBARA STARR SCOTT, et al., Consolidated Plaintiffs, v. CHARLIE ADDINGTON, JOEL THOMPSON, BOB LEWANDOWSKI, MARK McCULLOUGH, JOE BYRD, BOB POWELL, THE HOUSING AUTHORITY OF THE CHEROKEE NATION BOARD COMMISSIONERS in their personal and Official Capacities Composed of SAM ED BUSH, STANLEY JOE CRITTENDEN, ALEYENE HOGNER, NICK LAY, BILLY HEATH (as successor to NICK LAY), and MELVINA SHOTPOUCH and JOHN DOE(S), Defendant not yet known, Consolidated Defendants.	Case No. 99-CV-0156-(B) (formerly 99 CV 0161B(E)) Senior Judge Thomas R. Brett (CONSOLIDATED CASES)
-and- NICK LAY and MELVINA SHOTPOUCH, Third-Party Plaintiffs, -vs- GARLAND EAGLE, REX EARL STARR, JENNIE L. BATTLES, GEORGE THOMAS, ERVIN ROCK, TINA JORDAN, BILLY HUGHES and DENISE HONOWA, Third-Party Defendants.	

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ORDER DISMISSING DEFENDANTS
JOE BYRD AND ROBERT POWELL WITH PREJUDICE

Upon the Unopposed Application of Plaintiffs Birdwell and Starr Scott for an order dismissing Defendants Joe Byrd and Robert Powell filed herein and for good cause shown, IT IS HEREBY ORDERED that the above-referenced Defendants are hereby dismissed with prejudice. Plaintiffs' claims against the remaining Defendants are not affected by this order and remain pending before this court.

SENIOR JUDGE THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLYSON L. FURR,

Plaintiff,

v.

ICON HEALTH & FITNESS, INC., formerly known as HEALTHRIDER, CORPORATION and JANE DOE

Defendants.

No. 99-CV-0344B (M)
Judge Thomas R. Brett

ORDER FOR DISMISSAL

NOW ON THIS 31ST day of January, 2000, the above entitled cause comes on before the Honorable Thomas R. Brett, United States Judge of the Northern District of Oklahoma, upon the Application for Dismissal Without Prejudice of the Jane Doe Defendant, Mary Cappa, in the above entitled cause. The Court finds that the Application should be granted as it pertains to the Jane Doe Defendant also known as Mary Cappa reserving all rights of the Plaintiff to proceed against **ICON HEALTH & FITNESS, INC.** and hereby enters the following Order:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Jane Doe Defendant also known as Mary Cappa is hereby dismissed from the above entitled cause without prejudice reserving all rights of the Plaintiff to proceed against **ICON HEALTH & FITNESS, INC.**

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THOMAS R. BRETT
Judge of the United States District Court for the Northern District of Oklahoma

PREPARED AND SUBMITTED BY:

RANDALL A. GILL, OBA #10309
2512 East 21st Street, Suite 100
Tulsa, Oklahoma 74114-1706
(918) 747-1958
(918) 747-1108 fax

CERTIFICATE OF MAILING

This is to certify that on the date listed below a true and correct copy of the above and foregoing document was:

_____ Mailed with postage prepaid thereon;
_____ Faxed;
_____ Hand Delivered

to the following person:

Gregory D. Nellis
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524

Randall A. Gill

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN SUMMERFIELD, and DAVID CORNSILK,	)	
Plaintiffs,	)	
vs.	)	No. 98-C-328-B(EA)
MARK MCCOLLOUGH, REX EARL STARR, JENNIE L. BATTLES, LISA FINLEY, and JOE BYRD,	)	
Defendants.	)	

ORDER

Before the Court is Plaintiffs' Objection to and Request for Review of Clerk of the Court's Order (Docket No. 403). Plaintiffs object to the Clerk's award of $3,086.65 of the $5,282.85 costs sought by defendant Mark McCollough ("McCollough") based on the following: (1) McCollough failed to file a brief and separate verification in support of his bill of costs; and (2) McCollough is not entitled to recover costs for depositions of non-party witnesses Barbara Starr Scott, Terry Barker, Robert Powell, Lisa Finley, Charles Gourd, Bruce Taylor and Paul Thomas.

The Court finds no merit in plaintiffs' first objection. Local Rule 54.1 requires a party recovering costs to file "a bill of costs on the form available from the clerk of court, a brief in support, and a verification of the bill of costs." McCollough filed the form bill of costs which contained a verification by his counsel that "the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed." (Docket No. 398). Although he did not file a brief, he did submit the

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invoices for the deposition transcripts which were "necessarily obtained for use in the case" in support of his bill of costs. The Court is not persuaded that McCollough's failure to file a "separate" verification and brief "impaired the Plaintiffs' ability to prepare for and respond to the arguments the Defendant made in the costs hearing." The Court entered Judgment on November 3, 1999 awarding Defendant McCollough costs if timely sought under Local Rule 54.1 and McCollough provided invoices for the costs sought.

The Court also finds no merit in plaintiffs' second objection to the award of costs for deposition transcripts of the above "non-party" witnesses. Bob Powell and Lisa Finley were parties to this lawsuit, although plaintiffs ultimately dismissed the claims against them. In addition, all of these witnesses were key witnesses in this case. Plaintiffs called each of these witnesses to establish their case-in-chief and defendant McCollough used the depositions of each of these witnesses in cross-examination.

Accordingly, the Court affirms the Clerk's cost award of $3,086.65 to defendant McCollough.

IT IS SO ORDERED this 31st day of January, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELLA IRWIN, individually, and as Parent and next friend of PAIGE ROBERTS,

Plaintiffs,

vs.

STATE OF OKLAHOMA, ex rel. OOLOGAH-TALALA SCHOOL DISTRICT; CITY OF OOLOGAH; PAT GOGLER, individually and in her official capacity as Principal; and BOB SLAGLE, individually and in his official capacity as Chief of the Oologah Municipal Police Department,

Defendants.

Case No. 99CV0446B (M)

ORDER OF DISMISSAL

The Court has before it Motion to Dismiss of Defendants, Oologah-Talala School District (the "School District") and Pat Gougler ("Gougler") filed January 5, 2000. The Plaintiffs failed to file a response to the Defendant's Motion to Dismiss. In accordance with N.D.L.R. 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court, having reviewed the Motion to Dismiss, and through an independent inquiry, has determined that the Motion to Dismiss should be granted.

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss is granted and all claims asserted in the captioned action against the School District and Gougler are dismissed.

Judge of the District Court

1-31-00

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 2 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRISTOL FUND LTD., a Limited Liability Corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 99-CV0943BU(M)
WILLIAM BARTMANN, an individual, DIMAT CORPORATION, an Oklahoma corporation, JAY L. JONES, an individual, KATHRYN A. BARTMANN, an individual, GERTRUDE BRADY, an individual, MIKE C. TEMPLE, an individual, CHARLES C. WELSH, an individual, and JOHN DOES 1 THROUGH 30, individuals or business organizations,	)	
Defendants.	)	

ENTERED ON DOCKET

DATE JAN 2 8 2000

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Bristol Fund, LTD., by and through its counsel of record, K. Clark Phipps and John J. Carwile of the law firm of Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, and gives notice of dismissal without prejudice as to Defendant Charles Welsh.

Respectfully submitted,

ATKINSON, HASKINS, NELLIS, HOLEMAN, PHIPPS, BRITTINGHAM & GLADD

K. Clark Phipps, OBA#11960
John J. Carwile, OBA #10757
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that on this, the 28 day of January, 2000, a true, correct, and exact copy of the above and foregoing instrument was mailed to the following counsel of record, with proper postage thereon fully prepaid:

John B. Heatly
Attorney at Law
Bank One Tower
100 N. Broadway, Suite 1700
Oklahoma City, Oklahoma 73102-8820

R. Thomas Seymour
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Tulsa, Oklahoma 74103-4288

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Tulsa, Oklahoma 74103-3708

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Edward L. Powers
Attorney at Law
885 Third Avenue
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Tulsa, Oklahoma 74119

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Chicago, Illinois 60606

Jack G. Stern
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570 Lexington Avenue
New York, New York 10022

Brad Beasley
Attorney at Law
100 W. 5th Street, Suite 800
Tulsa, Oklahoma 74103

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANK HAPOALIM B.M., an Israeli banking corporation,

Plaintiff,

vs.

Case No. 99-CV-0828C (J)

CHASE SECURITIES, INC., a Delaware corporation, SECURITIES MULTIPLE ASSET RATED TRUST 1997-6, a Delaware business trust, ANDERSON WORLDWIDE, successor to ARTHUR ANDERSEN, L.L.P., a partnership, MAYER, BROWN & PLATT, a partnership, DUFF & PHELPS CREDIT RATING CO., an Illinois corporation, STANDARD & POOR'S RATINGS SERVICE, a division of MCGRAW-HILL COMPANIES, INC., a New York corporation, FITCH IBCA, INC., a Delaware corporation, WILLIAM BARTMANN, an individual, DIMAT CORPORATION, an Oklahoma corporation, JAY L. JONES, an individual, KATHRYN A. BARTMANN, an individual, GERTRUDE BRADY, an individual, MIKE C. TEMPLE, an individual, JAMES D. SILLS, an individual, CHARLES C. WELSH, an individual, and JOHN DOES 1 THROUGH 30, individuals or business organizations,

Defendants.

ENTERED ON DOCKET

DATE JAN 28 2000

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Bank Hapoalim B.M., by and through its counsel of record, K. Clark Phipps and John J. Carwile of the law firm of Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham

& Gladd, and gives notice of dismissal without prejudice as to Defendant Charles Welsh.

Respectfully submitted,

ATKINSON, HASKINS, NELLIS, HOLEMAN, PHIPPS, BRITTINGHAM & GLADD

K. Clark Phipps, OBA#11960
John J. Carwile, OBA #10757
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that on this, the 28 day of January, 2000, a true, correct, and exact copy of the above and foregoing instrument was mailed to the following counsel of record, with proper postage thereon fully prepaid:

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100 N. Broadway, Suite 1700
Oklahoma City, Oklahoma 73102-8820

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Attorney at Law
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Tulsa, Oklahoma 74103-4288

P. David Newsome, Jr.
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15 E. 5th Street
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James M. Reed
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Tulsa, Oklahoma 74103-3708

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David L. Bryant
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Tulsa, Oklahoma 74103

James Rolfes
Attorney at Law
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Chicago, Illinois 60606

Jack G. Stern
Attorney at Law
570 Lexington Avenue
New York, New York 10022

Brad Beasley
Attorney at Law
100 W. 5th Street, Suite 800
Tulsa, Oklahoma 74103

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 28 2000

GWEN DAVIS and MARCUS BLANTON,

Plaintiffs,

vs.

J.C. PENNEY COMPANY, INC., a Delaware Corporation, and SIMON PROPERTY GROUP, L.P. a Delaware Limited Partnership, aka EASTLAND MALL,

Defendants.

Case No. 99 CV 0575 BU (J)

FILED
JAN 27 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated and agreed by and between the parties hereto, through their respective legal counsel, that the above-entitled cause be dismissed with prejudice and without costs to any party, because all matters in controversy for which said action was brought have been fully compromised, settled and adjourned.

Date: 1/21/00

By _____
Gerald L. Hilsher
Stoops, Clancy & Hilsher
2250 E. 73rd Street, Ste. 400
Tulsa, Oklahoma 74136-6833
Attorney for Plaintiffs

By _____
Eugene Robinson
15 West Sixth Street, Ste. 1850
Tulsa, Oklahoma 74119
Attorney for J.C. Penney Company, Inc.

By _____
Timothy F. Sterling
Crowe & Dunlevy
321 S. Boston, Ste. 500
Tulsa, Oklahoma 74103
Attorney for Simon Property Group, L.P.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN E. ACKENHAUSEN,

Plaintiff,

vs.

CITY OF TULSA,

Defendant.

Case No. 99-CV-186-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27th day of January, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES W. O'DELL,
562-88-6207

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 98-CV-909-M

ORDER

Plaintiff, Charles W. O'Dell, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

[1] Plaintiff's April 14, 1994, application for disability benefits was denied. The denial was affirmed on reconsideration and by the Appeals Council. Plaintiff appealed the agency decision to the district court which remanded the case for further proceedings. In accordance with the court's order, a hearing before an Administrative Law Judge ("ALJ") was held August 20, 1998. By decision dated September 25, 1998, the ALJ entered the findings that are the subject of this appeal. Pursuant to 20 C.F.R. § 404.984 (d) the ALJ's decision became the final decision of the Commissioner after remand.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 29, 1952, and was 46 years old at the time of the hearing. He has a 9th grade education and formerly worked as a truck driver. He claims to have been unable to work since June 17, 1993, as a result of low back, neck and knee pain; high blood pressure; and headaches. He last met the insured status requirements of the Act on December 31, 1996, therefore disability had to be established on or before that date. The ALJ determined that although Plaintiff is unable to return to his former work, he has the capacity to perform light work with limitations.[2] Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step

[2] The ALJ found Plaintiff could perform work except for lifting over 10 pounds frequently or 20 pounds occasionally; repetitive pushing or pulling of arm controls' repetitive or prolonged extreme rotation, flexion, or extension of the neck; more than occasional repetitive or prolonged overhead reaching; exposure to vibration affecting the neck; climbing ladders, ropes, or scaffolds; more than occasional stooping, crouching, bending, kneeling, crawling, balancing, or climbing stairs or ramps; or work performed in a high-stress environment or that would not allow him to alternately sit or stand every hour for 5 to 10 minutes. [R. 279].

evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the Commissioner's decision should be reversed and the case remanded for further development. He argues that on remand from the court, the ALJ failed to follow the rule of the case in evaluating the vocational impact of his neck impairment. The court order remanding the case instructs:

> On remand the ALJ should further define the exact impairment which Plaintiff has; the ALJ should present the specific impairment to the vocational expert; and the ALJ should obtain sufficient explanation from the vocational expert to support a conclusion that Plaintiff either can or cannot perform work in the national economy.

[R. 326-27]. According to Plaintiff, the ALJ did not clarify his prior determination concerning Plaintiff's neck impairment as ordered, but instead made new findings that were less restrictive than his previous findings. Plaintiff argues that such new findings violate the law of the case doctrine set out in *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) which holds that "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case."

In the previous decision, the ALJ found that Plaintiff could not perform work that required frequent flexion or extension of the neck. On cross-examination of the vocational expert there was some question as to precisely what the ALJ meant by the limitation of frequent flexion or extension of the neck. The case was remanded for the express purpose of further defining the neck impairment. On remand the ALJ clarified

that Plaintiff's neck impairment included: "no repetitive or prolonged extreme rotation, flexion or extension of the neck." [R. 275, 306] [emphasis supplied]. The vocational expert testified to the existence of a significant number of jobs that could be performed with such a limitation.

The Court finds that the case was remanded for the express purpose of clarifying the degree of neck impairment and that the ALJ appropriately conducted the proceedings and issued his decision on remand in accordance with the court's order and the legal standards established by the Commissioner and the courts. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 27th Day of January, 2000.

Frank H. McCarthy

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 2 0 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DR. MARK HAYES, et al.

Plaintiffs,

vs.

CAROL M. BROWNER, in her capacity as Administrator of the United States Environmental Protection Agency, et al.,

Defendants.

Case No. 97-CV-1090-BU(J)

Consolidated With

OKLAHOMA WILDLIFE FEDERATION, an Oklahoma non-profit corporation, et al.,

Plaintiffs,

vs.

CAROL M. BROWNER, in her capacity as Administrator of the United States Environmental Protection Agency, et al.,

Defendants.

Case No. 99-CV-20-BU(J)

ENTERED ON DOCKET

DATE JAN 27 2000

REPORT AND RECOMMENDATION

Plaintiffs filed a motion for summary judgment on April 2, 1998. [Doc. No. 44-1]. Defendants filed a motion for summary judgment and a response to Plaintiff's motion for summary judgment on April 29, 1999. [Doc. No. 49-1]. The motions for summary judgment were referred to the Magistrate Judge for report and recommendation on November 10, 1999.

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Plaintiff asserts that, pursuant to the Clean Water Act ("CWA"), the Environmental Protection Agency ("EPA") has a nondiscretionary duty to promulgate Total Maximum Daily Loads ("TMDLs") for the state of Oklahoma due to the state's failure to promulgate and submit proposed TMDLs to the EPA. Defendants acknowledge the prior ruling of the Court on Defendants' Motion to Dismiss, finding that the CWA imposes certain duties and that prolonged state inaction can trigger those duties. However, Defendants assert that under the facts of this case Oklahoma has promulgated a sufficient number of TMDLs and that any mandatory EPA duties, imposed due to state inaction, have not been triggered.

The Magistrate Judge has thoroughly reviewed the briefs of the parties, the case law, and the supplemental authorities submitted by the parties. The Magistrate Judge concludes that under the facts as presented in this case, summary judgment in favor of the Defendant is appropriate. The Magistrate Judge recommends that Plaintiffs' motion for summary judgment be **DENIED** [doc. no. 44-1], and that Defendants' motion for summary judgment be **GRANTED**. [Doc. No. 49-1].

Defendants have additionally filed a Motion to Strike Plaintiffs' Expert Affidavit. [Doc. No. 48-1]. The Magistrate Judge recommends that the Motion be **GRANTED**.[1/]

[1/] Defendants assert that the affidavit submitted by the Plaintiffs' addresses issues not relevant to this Court's decision. The Magistrate Judge agrees. Consideration of the affidavit is not necessary with respect to the issues presented in this case.

I. FACTUAL BACKGROUND AND UNDISPUTED MATERIAL FACTS

The Environmental Protection Agency ("EPA") identified, in December 1978, the specific pollutants which were to provide the basis for the development by the states of TMDLs.[2/] The parties agree that following the EPA's identification of pollutants in December 1978, each state was required to identify impaired waters and submit proposed TMDLs by June 26, 1979. Plaintiffs assert that each state was to submit a list of water quality limited segments ("WQLSs") and TMDLs. Defendants characterize the required submissions as "an identification of impaired waters and . . . one or more TMDLs. . . ." See Defendant's Brief, filed April 29, 1999 at 7.

The State of Oklahoma did not submit a WQLS List or proposed TMDLs by the June 26, 1979 deadline. EPA acknowledges that EPA did not promulgate a WQLS List or issue TMDLs for listed Oklahoma waters in 1979.

The CWA requires states to submit a "303(d) List"[3/] from "time to time." 33 U.S.C. § 1313(d)(D)(2). In 1992 EPA promulgated regulations interpreting the statutes and requiring states to submit the 303(d) List on October 22, 1992, and, thereafter, on April 1 of even numbered years. See 40 C.F.R. § 130.7(d)(1).

Defendants and Plaintiffs acknowledge that Oklahoma did not submit a 303(d) List for the years 1980, 1982, 1984, 1986, 1988, or 1990. Defendants specifically

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[2/] "TMDL" refers to "Total Maximum Daily Load." Generally, TMDLs are the greatest amount of pollutant that a particular water body can receive on a daily basis without violating that state's water quality standards.

[3/] Section 303(d) of the CWA is 33 U.S.C. § 1313(d). States are to identify and submit WQLSs and TMDLs.

point out, however, that Oklahoma was not required, prior to 1992, to submit such lists in even numbered years.

Oklahoma submitted its first 303(d) List in October of 1992. Oklahoma's 1992 List identified 60 WQLSs for TMDL development within two years.[4/] Oklahoma submitted no TMDLs prior to April 1, 1994. The EPA did not promulgate its own 303(d) List or issue TMDLs.

Oklahoma submitted a 1994 303(d) List sometime around July 7, 1994. The 1994 List contained approximately 68 WQLSs for which TMDLs were to be slated for development within two years.[5/] The EPA approved the 1994 303(d) List on July 20, 1994. Oklahoma submitted a proposed TMDL for one of the WQLSs, but did not submit proposed TMDLs for the remaining WQLSs, for development within the next two years. EPA approved Oklahoma's submission. Plaintiffs contend that the EPA approval occurred although no public notice of the TMDL was given and although the TMDL did not meet the "requirements under 303(d)." See Plaintiff's Brief, filed April 2, 1999, at 11. Defendants disagree with Plaintiffs' characterization.

Plaintiffs and Defendants agree that no TMDLs or WQLSs were approved by the EPA prior to May 9, 1995.

[4/] Plaintiffs additionally note, and Defendants do not dispute, that several of the identified WQLSs had multiple impairments because the identified water failed to meet more than one applicable water quality standards. Plaintiffs note that the approximately 140 TMDLs were to be developed within two years of the 1992 303(d) List.

[5/] Plaintiffs assert that, considering multiple water impairments, the actual number of TMDLs for development over the next two years was approximately 429. Defendants assert that the actual number is 164. The Court concludes that resolution of this factual dispute is unnecessary for the purpose of this summary judgment motion.

Oklahoma submitted a 1996 303(d) List around June 3, 1996, which was approved by the EPA on June 24, 1996. The 1996 List identified 59[6/] WQLSs. When the multiple water impairments are considered, the List amounts to approximately 1,588 TMDLs for development.

The first notice of intent to sue by Plaintiffs Mark Hayes and Ed Brocksmith was served on the EPA on or about July 30, 1997. The lawsuit was filed December 11, 1997.

As of December 11, 1997, of the 59 WQLSs identified in the 1996 303(d) List, three TMDLs had been performed, submitted, and approved for WQLSs by the EPA. Plaintiffs assert that the approved TMDLs addressed limitations for dissolved oxygen standards (without addressing other impairments), were not approved within 30 days, and were not subject to appropriate public notice. Defendant disputes Plaintiffs' characterization.

Plaintiffs assert that although Defendants claim to have approved 22 TMDLs prior to receipt of Plaintiffs' Notice of Intent to Sue, none of the TMDLs met all statutory and regulatory requirements. Defendants dispute Plaintiffs' characterization. Plaintiffs assert that of the 29 TMDLs that Defendants claim to have approved prior to the filing of the lawsuit by Plaintiffs, none meet all statutory and regulatory requirements. Defendants dispute Plaintiffs' characterization.

[6/] In "undisputed material fact number 30," Plaintiffs state that 579 WQLSs were identified in the 1996 List. Defendants do not dispute this "fact." Subsequent references to the 1996 List, however, list "59 WQLSs." See Undisputed Facts 32 and 34 in Plaintiffs' Brief filed April 2, 1999. The discussion of the 1996 List in the argument portion of Plaintiffs' Brief refers to 579. Determination of this issue is not necessary for the purpose of deciding Plaintiffs' and Defendants' motions.

EPA notes that their guidance documents provide that an expeditious schedule for state completion of TMDLs would normally extend from eight to thirteen years.

Oklahoma submitted and the EPA approved WQLSs in 1992, 1994, 1996, and 1998. Defendant asserts that between 1992 and 1999 the EPA has formally approved 15 TMDLs for WQLS. Defendant lists 15 TMDLs for pollutants of concern, and 32 TMDLs for state waters which Defendant asserts are approved. EPA additionally observes that Oklahoma has submitted two draft TMDLs which the EPA has technically approved. Plaintiffs state that they dispute that EPA has approved "a total of 49 TMDLs." Plaintiff's Combined Response Brief, filed June 11, 1999, at 7.

Defendants contend that although Oklahoma solicited public comment on the TMDLs, none of the Plaintiffs in this litigation elected to comment. Plaintiffs do not dispute that Plaintiffs did not comment upon the TMDLs. Plaintiffs claim that the notice given by Oklahoma of the proposed TMDLs was inadequate.

Oklahoma has committed to a schedule for establishing TMDLs for all WQLSs on the 1998 list over a period of 12 years. Oklahoma has proposed that it will complete up to 292 TMDLs by 1999, an additional 172 TMDLs by 2003, an additional 402 TMDLs by 2007, and an additional 576 TMDLs by 2010. Plaintiffs assert that Oklahoma will not keep the proposed schedule based on Oklahoma's history.

II. STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to

judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986).

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 317 (1986). "[T]he burden on the moving party may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325; Committee for the First Amendment v. Campbell 962 F.2d at 1517.

To survive a motion for summary judgment, the nonmovant "must establish that there is a genuine issue of material facts. . . ." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 248. The substantive law determines which facts are material. Id. And the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). In addition, the evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate their

entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

In Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992) (citations and footnotes omitted), the Tenth Circuit Court of Appeals summarized the standard for summary judgment.

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Factual disputes about immaterial matters are irrelevant to a summary judgment determination. We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." The movant need only point to those portions of the record which demonstrate an absence of a genuine issue of material fact given the relevant substantive law.
>
> A movant is not required to provide evidence negating an opponent's claim. Rather the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant.

Id.

III. CLEAN WATER ACT

A. CLEAN WATER ACT

Congress passed the Federal Water Pollution Control Act, commonly referred to as the "Clean Water Act" ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The

CWA provides, as one "enforcement mechanism" the right to private citizens to bring action in federal court when the EPA fails to perform a nondiscretionary act. 33 U.S.C. § 1365(a)(2).

This action primarily involves 33 U.S.C. § 1313(d) (Section 303 of the CWA). Subsection (d) provides:

> (1)(A) Each state shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
>
> (B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.
>
> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.
>
> (D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the

identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each state shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), 1(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

33 U.S.C. § 1313(d).

Plaintiffs assert that certain EPA duties under the CWA are nondiscretionary. The District Court previously decided, with regard to Defendants' Motion to Dismiss, that the state has a duty to submit TMDLs, and that the failure to submit any TMDLs, over a period of time, could be considered a constructive submission of "no TMDLs," triggering the EPA's duty to promulgate TMDLs.

Plaintiffs assert that Oklahoma has either not submitted sufficient TMDLs, or the TMDLs submitted by Oklahoma do not comply with statutory and regulatory requirements. Plaintiffs assert that the EPA has therefore not complied with certain mandatory duties under the CWA, and Plaintiffs request that this Court order the EPA to develop TMDLs. Defendants assert that Oklahoma has submitted TMDLs which the EPA has approved. Defendants characterize Plaintiffs' arguments as challenging whether or not the EPA's approval of the TMDLs was arbitrary and capricious, and assert that such a challenge is not appropriate under the CWA.

B. SUBMISSION AND APPROVAL OF TMDLS

Plaintiffs claim that Oklahoma's failure to submit required TMDLs has triggered the EPA's duty to act. Plaintiffs note that the initial deadline to submit the 303(d) List and TMDLs was June 26, 1979, and Plaintiffs did not submit the required lists in 1980, 1982, 1984, 1986, 1988, or 1990. Plaintiffs note that Oklahoma's first action did not occur until October of 1992. Plaintiffs acknowledge that Oklahoma submitted and the EPA approved 303(d) Lists in 1992, 1994, and 1996. Plaintiffs assert that the first TMDL submission by Oklahoma was approved by the EPA on August 23,

1995. Defendants assert that, over the past five years, Oklahoma has submitted and the EPA has approved 47 TMDLs.

Plaintiffs initially claim that Oklahoma failed to submit any TMDLs for over 13 years. Plaintiffs assert that, pursuant to case law, the failure to submit any TMDLs for 13 years triggered the mandatory duty by the EPA to establish TMDLs.

Assuming that the failure to act over a 13 year period is sufficient evidence of inactivity to trigger the mandatory duties of the EPA, such a situation does not accurately describe the current situation. The lack of activity with regard to WQLSs ceased in 1992 when Oklahoma submitted its first 303(d) List. The lack of activity with regard to TMDLs ceased in 1995 when Oklahoma submitted and EPA approved TMDLs.[7/] Within their initial argument, however, Plaintiffs do not address the fact that Oklahoma submitted and the EPA approved TMDLs prior to the filing by Plaintiffs of this action.[8/] Plaintiffs submit no cases discussing a 13 - 16 year failure to submit TMDLs, followed by submission of TMDLs, followed by a lawsuit. Plaintiffs cannot establish that Oklahoma has submitted "no TMDLs."

[7/] Although the parties disagree on the exact number of TMDLs, at least three TMDLs were submitted and approved, with as many as 22 or 29 being approved by the EPA prior to Plaintiffs filing the lawsuit against the EPA in 1997. Defendant asserts that the EPA has approved 47 TMDLs in the past five years which have been submitted by Oklahoma.

[8/] Plaintiffs do assert that TMDL activity after the filing of this action cannot be considered by this Court. Plaintiffs refer the Court to the unpublished decision of the Special Master in Clifton, *supra*. Defendants assert that courts routinely consider post-complaint TMDL activity, and refer the court to Scott v. City of Hammond, 741 F.2d 992, 997 (7th Cir. 1984), n.11; Sierra Club v. Browner, 843 F. Supp. 1304, 1313 (D. Minn. 1993); Sierra Club v. Hankinson, 939 F. Supp. 865, 976 (N.D. Ga.). Defendants additionally point out that the Special Master in Clifton suggested that post-lawsuit submissions could be considered evidence of "continuing progress."

Plaintiffs refer the Court to Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984). In Scott, the Plaintiff challenged the EPA under the CWA for the EPA's failure to prescribe TMDLs for the discharge of pollutants into Lake Michigan and for ensuring that water quality standards complied with the CWA. The Court noted the difference between a suit brought pursuant to the CWA and one brought under the Administrative Procedures Act ("APA"). "The only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions is a suit for judicial review under the Administrative Procedure Act." Id. at 995. The Court initially concluded that the Plaintiff had not brought a claim pursuant to the APA, noting that such a claim generally challenged an agency action as arbitrary, capricious, or an abuse of discretion. With regard to the required submission of TMDLs, the Court noted that the statutes required submission within 180 days of the EPA's identification of pollutants, and that the states involved in the lawsuit "have not as yet submitted proposed TMDLs." Id. at 996, n.10. The Court concluded that "if a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's." Id.

This conclusion, by the Seventh Circuit Court of Appeals, is the same conclusion reached by the District Court in deciding the Motion to Dismiss in this case. The Seventh Circuit Court of Appeals remanded the action to the district court. The Seventh Circuit concluded that "if the district court agrees with our analysis that in this case the delay by the states may amount to the 'constructive submission' of no TMDL's, then the EPA would be under a duty to either approve or disapprove the

'submission.' If the EPA approves . . . the next step for a dissatisfied party would be to seek judicial review of the EPA's action. If the EPA disapproves, it then presumably would be under a mandatory duty to issue its own TMDL's." Id. at 996. The Seventh Circuit additionally, in a footnote, observed that:

> There may be reasons, wholly unknown to us at this time, which may justify the states' failure to submit TMDL's and the EPA's concomitant failure to act. However, on remand, the district court may order the EPA to proceed as if the states had submitted proposals of no TMDL's unless the EPA promptly comes forward with persuasive evidence indicating that the states are, or will soon be, in the process of submitting TMDL proposals or that some factor beyond the scope of the complaint has made TMDL submissions impracticable.

Id. at 996 (emphasis added).

Scott does support Plaintiffs argument that the total refusal by a state to submit any TMDLs can be considered a "constructive submission" of no TMDLs and therefore trigger the EPA's duty to act. However, in Scott, unlike the case presently before the Court, the states involved submitted no TMDLs. Although Plaintiffs assert that the TMDLs submitted by Oklahoma are inadequate, do not comply with the regulations, and were improperly approved, Plaintiffs acknowledge that Oklahoma has submitted some "TMDLs." Further, in Scott, the Seventh Circuit specifically pointed out that if the delay constitutes a constructive submission of "no TMDLs" by the state, the EPA then has a duty to approve or disapprove the constructive submission. Scott notes that if the EPA approved the constructive submission of "no TMDLs," the next step for the aggrieved party was to seek judicial review, pursuant to the APA, of the EPA's

actions. Id. at 996. Therefore, even if the EPA improperly approves invalid TMDLs, the appropriate action is a case brought pursuant to the APA, not under the CWA. Finally, Scott also contemplates submission of TMDLs after the initiation of a lawsuit under the CWA. Id. at 996, n.11 ("the district court may order the EPA to proceed as if the states had submitted proposals of no TMDL's unless the EPA promptly comes forward with persuasive evidence indicating that the states are or will soon be, in the process of submitting TMDL proposals. . . .") (emphasis added).

Plaintiffs additionally refer the Court to Sierra Club v. Hankinson, 939 F. Supp. 865, 871 (N.D. Ga. 1996). In Hankinson, the Plaintiff sued under both the CWA and the APA. The Court addressed the Plaintiff's arguments under the CWA and the APA, and the case is decided, at least in part, under the APA.

> The Court concludes that EPA's approval of Georgia's totally inadequate TMDL submissions and schedule for submissions of TMDLs is arbitrary and capricious in violation of the Administrative Procedures Act and, therefore, plaintiffs are entitled to summary judgment on the total maximum daily load issue.

Id. at 867. The arbitrary and capricious language certainly suggests that the Court considered the Plaintiff's claims pursuant to the APA.[9/] Plaintiffs, in the action

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[9/] Plaintiffs assert that Hankinson was decided under the CWA. Certainly some of the language in Hankinson suggests that the court decided the action, in part, under the CWA. The Hankinson court observes that the CWA requires states to submit TMDLs for all WQLSs, that sixteen years passed before Georgia submitted its first TMDL; that Georgia developed only two TMDLs and both were submitted after the filing of the action; that the TMDLs violated numerous requirements of § 303(d); that Georgia had no plans to develop additional TMDLs for all WQLSs; and that under Georgia's "planned" development, the institution of TMDLs would take over one hundred years from beginning to completion. The Court concluded that the EPA's "failure to disapprove of Georgia's inadequate TMDL submissions was arbitrary and capricious in violation of the Administrative Procedure Act and that EPA's failure to promulgate TMDLs for Georgia violates the Clean Water Act." Id. at 872. Clearly, at least a portion of the court's decision is pursuant to the APA. (continued...)

presently before the Court, agree that they are presenting an action under the CWA, not the APA[10/], and Plaintiffs' focus is on the EPA's failure to comply with its mandatory duties pursuant to the CWA. Furthermore, in Hankinson, the court specifically found that the constructive submission analysis was not appropriate because the state had made some TMDL submissions, "albeit totally inadequate" submissions. Id. at 872, n.6.

Plaintiffs also rely on Alaska Center for the Environment v. Reilly (ACE I), 762 F. Supp. 871 (N.D. Ga. 1996). In ACE I, the parties did not dispute that ten years passed and the state submitted no TMDLs to the EPA and the EPA took no action. After the citizen suit was filed, the state submitted a list of WQLSs (but no TMDLs) to the EPA. The EPA took no action. The Plaintiffs contended that the failure of Alaska to submit any TMDLs constituted a constructive submission triggering the

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[9/] (...continued)
This Court is not convinced that the Hankinson court's decision with regard to the failure to promulgate TMDLs is truly based solely on a CWA action with regard to mandatory duties imposed on the EPA. (As noted by Defendants, a cause of action may be brought pursuant to the CWA or the APA, but not both.) However, assuming that the TMDL portion of the Hankinson court's decision was decided solely as a CWA case, the record in Hankinson indicated that no TMDLs were submitted for sixteen years prior to the initiation of the lawsuit; after the initiation of the lawsuit two TMDLs were submitted; and the "planned" completion of the proposed TMDLs would take 100 years. Each of these factors contrasts with the facts presented to this Court.

[10/] Defendants devote a portion of their brief to discussing Plaintiff's remaining APA claim. (Defendants note Plaintiffs' sole remaining APA claim is pursuant to 706(1) of the APA and involves nondiscretionary duties.) Defendants argue that summary judgment must be granted in favor of Defendants on this claim. Defendants assert that Plaintiffs, under this portion of their APA argument, must prove that a mandatory legal requirement or nondiscretionary duty under the CWA has not been performed. Defendants assert that, pursuant to their arguments related to Plaintiffs' CWA case, Plaintiffs cannot prove the existence of such a duty. Defendants additionally argue that a party may not bring duplicative causes of action under the CWA and the APA. Plaintiffs do not respond to this portion of Defendants' argument. Assuming Plaintiffs are pursuing a limited APA claim, the analysis of Plaintiff's cause of action on this limited claim would not substantially differ from the Court's discussion on EPA's mandatory duties under the CWA. Plaintiffs have not established a mandatory duty that the EPA has failed to perform.

EPA's duty to act. The EPA asserted that the EPA had no duty to act absent an actual submission by the state. The court concluded that the EPA was required to act when the states' actions indicated that the state refused to act. ACE I certainly supports Plaintiffs' positions with regard to the motion to dismiss. The case does not add much, however, to their position with regard to the motion for summary judgment. The state, in ACE I, had submitted no WQLSs or TMDLs prior to the filing of the action. After the filing of the action, the state submitted a list of WQLSs, but not TMDLs.

Plaintiffs additionally submitted an unpublished case for the Court's consideration. Sierra Club *et al.* v. Clifford *et al.*, Report of the special Master, No. 96-0527, unpublished decision (E.D. La. June 24, 1998), submitted by Plaintiffs on June 30, 1998 [Doc. No. 13-1] "Plaintiffs' Advice to the Court Regarding Recent Court Ruling." The Special Master in Clifford, however, specifically limits a portion of his review to the APA.

> Rejection of the plaintiffs' nondiscretionary duty and unreasonable delay claims does not mean that EPA's approvals are immune from judicial scrutiny. Although the judicial review of the Clean Water Act, 33 U.S.C. § 1369(b), is not applicable to EPA approval of state submissions under 303(d), an approval is "final agency action" reviewable under the Administrative Procedure Act, 5 U.S.C. § 704, to determine if the actions [sic] is "arbitrary, capricious, or an abuse or [sic] discretion or otherwise not in accordance with law or if the agency has failed to follow procedures required by law."

Id. at 19-20 (citations omitted). With regard to the submissions by the state of TMDLs and the subsequent actions of the EPA, the Special Master initially considers

and recommends action by the Court under the citizen suit provision of the CWA. The Special Master wrote that the EPA approved 15 TMDLs, all after the filing of the lawsuit, and that the state's duty to identify the waters and propose TMDLs arose 20 years prior to its first submission. The Special Master additionally observed that the state had submitted 15 TMDLs pertaining to a list of 255 waters, and that seven of the 15 TMDLs related to waters that were not included in the 1996 identification of water segments.[11/]

Defendants refer the court to Sierra Club v. Browner, 843 F. Supp. 1304 (D. Minn. 1993). The EPA asserted that it had approved 43 TMDLs, but the plaintiffs argued that the approved TMDLs were not valid. The plaintiffs contended that the EPA had ignored its mandatory duties by approving only a handful of TMDLs. The court observed that unlike cases finding a "constructive submission" of no WQLSs or TMDLs, the state had submitted WQLSs. "On this record, it would be inappropriate to find that the State has made a constructive submission of a WQLS list requiring the Administrator's action." The court concluded that "[a]lthough Minnesota and the EPA may not be implementing TMDLs as quickly as plaintiffs would like, the Act does not set deadlines for the development of a certain number of TMDLs. The Act instead requires the development of TMDLs 'in accordance with the priority ranking' of the WQLS list. A finding of submission of no TMDLs would therefore be inappropriate on this record." Id. at 1314.

[11/] Plaintiffs contend that Oklahoma took no action for 16 years; that only three TMDLs had been completed prior to the filing of the lawsuit; that only 29 TMDLs had been proposed (for 1,588 WQLSs) prior to the filing of the lawsuit, and only three of those 29 related to 303(d) List waters.

Defendants additionally submitted an unpublished case in support of their position. In Friends of the Wild Swan, Inc. *et al.* v. U.S. Environmental Protection Agency, *et al.*, unpublished decision (D. Mo. Nov. 5, 1999), submitted by Defendants on November 15, 1999, [Doc. No. 67-1], the parties agreed that the state had submitted WQLS Lists which did not contain all of the states WQLSs and that the state had not yet developed TMDLs for all of the WQLSs identified. The court noted that 3,000 TMDLs needed to be developed for the 1998 303(d) List. The court concluded that the only two mandatory duties imposed on the EPA were to review the submission of WQLSs or TMDLs within 30 days, and if the EPA disapproved of the submissions, to identify and develop appropriate WQLSs and TMDLs. "If the EPA approves an inadequate submission WQLSs or TMDLs, a plaintiff may properly challenge the approval under section 706(2)(A) of the APA on the basis that the approval was arbitrary and capricious." Id. at 12-13.

Plaintiffs' argument is premised on case law which supports the conclusion that a court can order the EPA to act when the court finds that the state has submitted "no TMDLs." In this case, Plaintiffs argue that "no TMDLs" were submitted prior to 1995. However, after 1995, the record indicates that TMDLs were submitted by Oklahoma and approved by the EPA.[12/] Because TMDLs were submitted and approved prior to the filing of the lawsuit by Plaintiff, the Court cannot find that the state of Oklahoma has entirely failed to submit TMDLs. In addition, if the Court were merely to order the

[12/] The specific number of TMDLs submitted or approved is disputed.

EPA to "act," based on a finding of no submissions prior to 1995, the EPA's actions could, presumably, simply constitute the EPA actions of the past four years -- approving the submitted TMDLs. The Court therefore finds that, based on the record submitted by the parties, a finding of "no TMDL" submissions cannot be made. This is in accord with Sierra Club *et al.* v. Clifford *et al.*, Report of the Special Master, No. 96-0527, unpublished decision (E.D. La. June 24, 1998),[13/] which is discussed above. The Special Master noted that the citizen suit provision under the EPA applies only when the EPA fails to perform a nondiscretionary duty, and "a subsequent approval of the state's submissions cured the previous failure to act." Id. at 17 - 19. Also in accord is Friends of the Wild Swan, Inc. *et al.* v. U.S. Environmental Protection Agency, *et al.*, unpublished decision (D. Mo. Nov. 5, 1999).[14/] The Court noted that "The constructive submission theory does not apply when the EPA approves a state's submissions of WQLSs and TMDLs prior to the commencement of the citizen suit, even if the submissions are obviously inadequate." Id.

C. MANDATORY REQUIREMENTS UNDER THE CWA

Plaintiffs recognize that the citizen act provisions under the CWA apply to only mandatory duties on the part of the EPA. Plaintiffs refer to several mandatory duties which Plaintiffs claim the EPA has not fulfilled.

[13/] This report was submitted by Plaintiffs on June 30, 1998 [Doc. No. 13-1] "Plaintiffs' Advice to the Court Regarding Recent Court Ruling."

[14/] This decision was submitted by Defendants on November 15, 1999. [Doc. No. 67-1].

Plaintiffs note Section 303(d)(1)(C) which requires each state to submit TMDLs. This provision imposes a mandatory duty upon the state to submit the TMDL. However, read in conjunction with 303(d)(1)(D)(2), the EPA does have a mandatory duty if the state fails to submit any TMDLs. Courts have imposed a duty on the EPA to act upon a finding of a constructive submission of "no TMDLs." Section 303(d)(1)(D)(2) requires the state to submit to the Administrator TMDLs pursuant to Section 303(d)(1)(C). The duty upon the Administrator is to either approve or disapprove the TMDLs not later than 30 days after submission, and if the Administrator disapproves the TMDL, to promulgate TMDLs. These mandatory requirements and the EPA's actions with regard to them are discussed above. Generally, the Magistrate Judge concludes that a constructive submission of "no TMDLs" has not occurred, and EPA complied with mandatory duties under the Act to approve or disapprove submitted TMDLs.

Plaintiffs refer to 40 C.F.R. § 130.7(d)(1)(ii) as imposing a mandatory duty that the TMDL shall be subject to public review. Plaintiffs assert that the EPA failed to provide notice identifying the development of proposed TMDLs.

The provision referenced by Plaintiff provides:

> (c) Development of TMDLs and individual water quality based effluent limitations.
> (1) Each State shall establish TMDLs for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking. For pollutants other than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQLS with seasonal variations and a margin of safety which takes into account any lack of

> knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.
> (i) TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.
> (ii) TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section. Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

40 C.F.R. § 130.7 (c)(1)(ii) (emphasis added). The provision does provide that the TMDL shall be subject to public review. It does not specify that such a duty is imposed on the EPA. The EPA approved the TMDLs. Plaintiffs can challenge the EPA's approval of the TMDLs as arbitrary and capricious under the APA due to the lack of the required notice.[15/]

Plaintiffs refer to numerous sections from Section 303(d) providing that each State should identify waters, establish priority rankings, establish TMDLs for identified waters, and submit to the Administrator. Plaintiffs state that the term "shall" which is repeatedly used throughout the regulations imposes mandatory duties on the EPA. However, as Defendants point out, each of the mandatory duties referenced by Plaintiffs are imposed by the Act on the "State," not the EPA. The EPA has the duty to approve or disapprove the State submissions. In this case, the EPA has approved

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[15/] The Court makes no finding with regard to whether or not the notice was required or was or was not properly given.

the submissions, and the remaining issue is whether or not that approval was arbitrary and capricious - which is a decision left for an APA action.

D. APPROVED TMDLS DO NOT MEET MINIMUM REQUIREMENTS

Plaintiffs note that Defendants purport to have approved 29 TMDLs prior to commencement of the lawsuit. Plaintiffs assert that the 29 TMDLs do not comply with the minimum legal requirements for TMDLs and therefore are not TMDLs. Plaintiffs note that some TMDLs were proposed for water segments which were not identified as WQLSs. Plaintiffs assert that some TMDLs were proposed for impaired water segments, but that the proposed TMDLs did not address the specific impairment. Plaintiffs assert that the public notice requirements for the proposed TMDLs were not met. Plaintiffs additionally contend that the proposed TMDLs were not in accordance with priority ranking, and that the EPA did not approve the majority of the TMDLs within the requisite 30 days. Plaintiffs therefore assert that the "TMDLs" submitted by Oklahoma and approved by the EPA are not valid TMDLs. Supposedly, Plaintiffs are therefore asserting that because the TMDLs are not valid, Oklahoma's submission of them and EPA's approval essentially constitutes "no action" and triggers EPA's mandatory duty to act.

Plaintiffs do not refer the Court to any unpublished cases in which the EPA's approval of TMDLs which did not specifically comply with the requirements of the CWA was found, by a court, to constitute "no submissions" pursuant to a challenge

to the EPA under the CWA.[16/] As noted in several cases cited by Plaintiffs and Defendants, inquiries into the TMDL approval process by the EPA necessarily entail determining whether or not the EPA's actions were arbitrary and capricious. Such an inquiry is not appropriate under the CWA, but is the subject of an APA suit which Plaintiffs agree they have not brought.

Plaintiffs continually assert that Plaintiffs are not contending that the approved TMDLs are "bad" TMDLs, or that they are improper. Plaintiffs contend that instead the TMDLs submitted (and approved) are not TMDLs because they do not meet the requirements under Section 303(d). However, the EPA has already concluded that the "TMDLs" referenced by Plaintiffs are actual TMDLs. Concluding, with Plaintiffs that the "TMDLs" did not meet the legal requirements necessarily requires a review of the EPA's decision-making. Although Plaintiffs' wording of the argument may have some appeal, determining whether or not the submitted and approved "TMDLs" really are

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[16/] Plaintiffs do refer the Court to the Special Master's Report which was adopted by the District Court in Sierra Club v. Clifford, 1998 WL 1032129 (E.D. La. Sept. 22, 1998), adopting Sierra Club *et al.* v. Clifford *et al.*, Report of the Special Master, No. 96-0527, unpublished decision (E.D. La. June 24, 1998), submitted by Plaintiffs on June 30, 1998 [Doc. No. 13-1] "Plaintiffs' Advice to the Court Regarding Recent Court Ruling." The Court has reviewed the Special Master's Report. Initially, the facts, although somewhat similar, differ from the facts submitted to this Court. (The Special Master noted that no TMDLs had been submitted prior to the filing of the lawsuit). Further, the Court is not persuaded by the reasoning of the Special Master in Sierra Club v. Clifford, that the appropriate proceeding was pursuant to the CWA rather than the APA. As noted by the Seventh Circuit Court of Appeals in Scott, if the EPA approves a constructive submission of "no TMDLs," the next step for the aggrieved party would be to seek judicial review, pursuant to the APA, of the EPA's actions. Scott, 741 F.2d 992, 996. Therefore, even if the EPA improperly approves invalid TMDLs, or approves a submission of "no TMDLs," Scott suggests that the appropriate action is to file an action pursuant to the APA. In addition, the Special Master in Clifford does observe that if the action was not appropriate under the CWA it could still have been appropriately construed under the APA. Sierra Club *et al.* v. Clifford *et al.*, Report of the Special Master, No. 96-0527, ("Even if one accepts EPA's argument that its duties under Section 303(d) are not specific enough to support a citizen suit, the Sierra Club is still entitled to relief. The Administrative Procedure Act allows a court to compel agency action 'unreasonably delayed.'").

"TMDLs" requires the Court to review something that the EPA has actually approved. Such an evaluation is appropriately left to an APA action.

E. NUMBER OF TMDLS APPROVED

Plaintiffs contend that even if the improper TMDLs submitted by Oklahoma and approved by the EPA would be considered valid, because Oklahoma has submitted only a small portion of required TMDL's, Oklahoma has not sufficiently complied with the requirements to promulgate TMDLs. Plaintiffs assert that the 1996 303(d) List contains 579 WQLSs, which would lead to the development and completion of 1,588 TMDLs. Plaintiffs contend that prior to the filing of this lawsuit Oklahoma had submitted only nine TMDLs. Plaintiffs note that, at most, Oklahoma has developed 49 TMDLs. Plaintiffs assert that "a little bit of compliance" is simply insufficient. Plaintiffs rely on Sierra Club v. Hankinson, 939 F. Supp. 865, 871-71 (N.D. Ga. 1996), and Idaho Sportsmen's Coalition v. Browner, 951 F. Supp. 962, 967 (W.D. Wash. 1996).

In Hankinson, as discussed above, the state of Georgia submitted two TMDLs after the filing of the lawsuit against the EPA. The court additionally noted that the state had no "current plans to develop TMDLs for all WQLSs," and that if the state's pace of development was followed completion of TMDLs would take over 100 years. The facts of Hankinson are different from the facts presently before this Court. Oklahoma submitted several TMDLs which were approved by the EPA prior to the filing of the action, and EPA asserts that Oklahoma has committed to establish all TMDLs

over the next 12 years. Furthermore, as noted above, Hankinson was decided, in part, under the APA.

Plaintiffs additionally refer to Idaho Sportsmen's Coalition v. Browner, 951 F. Supp. 962 (W.D. Wash. 1996). In Idaho, the plaintiff sued pursuant to the CWA and the APA. Idaho submitted no WQLS to EPA until 1989, and the EPA never approved or disapproved the 1989 list. Idaho submitted a second WQLS list in 1992 which was approved by the EPA one year later. The Browner court concluded in a prior decision in the same action in 1994, that the EPA's decision was contrary to law and directed the EPA to promulgate a WQLS List for Idaho. In 1995, the plaintiff and defendant moved for summary judgment on the TMDL issue. The court directed the EPA and the state of Idaho to cooperate in completing a TMDL schedule. EPA moved to dismiss the case in 1996, asserting compliance with the court order. The proposed TMDL schedule called for completion of the TMDL process over a period of 25 years, although the court noted that all necessary TMDL development would still not occur in that 25 year time frame unless hundreds of WQLSs "fell off the list." In considering the EPA's proposal, the court concluded that completion of the program could easily take 75 years. The court decided in favor of the plaintiff, but did so under the APA.

> [T]he plaintiffs have sued under both the CWA and the APA. Under the CWA, the EPA has a mandatory duty, if it disapproves a state's TMDL submission, to establish the TMDLs itself within thirty days. Under the APA, the court may compel agency action unlawfully withheld or unreasonably delayed, and a discretionary act may be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Here,

> the EPA's approval of Idaho's proposed TMDL schedule is arbitrary, capricious, and an abuse of discretion.

Id. at 967.

F. OTHER TECHNICAL DEFICIENCIES

Plaintiffs assert that numerous other problems exist with the EPA's approval of the TMDLs. According to Plaintiffs, the statutes require consideration of seasonal variations in setting a TMDL and the EPA considered only low flow conditions in approving Oklahoma's TMDLs. Plaintiffs also assert that the EPA was required to consider non-point sources, but did not. Plaintiffs contend that the approved TMDLs are not "daily" loads as required by the statute, and that Oklahoma has not properly incorporated approved TMDLs into their water management plans.

Plaintiffs assert that it is axiomatic that the EPA has no authority to approve TMDLs which do not meet statutory or regulatory guidelines, and that the TMDLs approved by the EPA do not meet such guidelines.

Defendants argue that the sole issue under a CWA action and the "constructive submission" doctrine is limited to whether EPA had a duty to review the state's determination to submit "no TMDLs." EPA asserts that because Oklahoma has submitted some TMDLs, the Court cannot find that there has been a decision by the state of Oklahoma to submit no TMDLs. Defendant asserts that Plaintiffs are actually challenging the content of the EPA's actions in approving the TMDLs submitted, and that such an action must be brought pursuant to the APA. The Court agrees.

Plaintiffs refer the Court to no published cases decided solely under the CWA where a court has ordered the EPA to act to promulgate TMDLs when the state has submitted TMDLs – although the submitted TMDLs may be questionable.[17/] Defendant refers to Browner, 843 F. Supp. at 1314 (constructive submission of no TMDLs inappropriate where state submitted TMDLs and EPA approved them); Scott, 741 F.2d at 997-98 (constructive submission inquiry limited to review of state determination to submit no TMDLs). Defendants also reference Kennecott Copper Corporation v. Costle, 572 F.2d 1349 (9th Cir. 1978) as holding that citizen suits under the CWA were intended to provide relief in a very narrow range of situations in which the EPA failed to perform mandatory duties.

Plaintiffs are, again, challenging specifics related to the EPA's approval of Oklahoma's proposed TMDLs. The decision by EPA to approve TMDLs which may be improper or which may not comply with statutory requirements is reviewable pursuant to the APA, not the CWA.

Defendants additionally challenge the Plaintiffs' assertions that the approval of the TMDLs did not comply with the numerous requirements listed by Plaintiffs. The Court declines to address this argument. The Court concludes that determining whether or not the EPA properly approved the TMDLs is appropriate only in a suit brought pursuant to the APA. Plaintiffs have not alleged such a cause of action, and therefore review of the EPA's action, at this time, would be inappropriate.

[17/] Plaintiffs assert that the TMDLs do not comply with the CWA and therefore are inappropriate.

RECOMMENDATION

The Magistrate Judge recommends that the District court **DENY** Plaintiffs' motion for summary judgment, and **GRANT** Defendants motion for summary judgment. In addition

Defendants have additionally filed a Motion to Strike Plaintiff's Expert Affidavit. [Doc. No. 48-1]. The Magistrate Judge recommends that the Motion be **GRANTED**.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 26th day of January 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27 Day of Jan, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 26 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOBBY GENE WALDRUP,

Defendant.

No. 98-CR-25-C
99-C-993-C

ENTERED ON DOCKET
DATE JAN 26 2000

JUDGMENT

This matter came before the Court for consideration of defendant Bobby Waldrup's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed previously,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, Waldrup, on his challenge to the legality of his conviction and sentence.

IT IS SO ORDERED this 26th day of January, 2000.

H. Dale Cook
Senior United States District Judge

23/2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 95-CV-949-K (J)
v.	)	
	)	
ONE HUNDRED TEN (110) ELECTRONIC AND/OR MECHANICAL GAMBLING DEVICES, MORE OR LESS, AND PROCEEDS,	)	
	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of Plaintiff's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Plaintiff, the United States of America, and against the Defendant, One Hundred Ten (110) Electronic and/or Mechanical Gambling Devices, More of Less, and Proceeds, and that Plaintiff is entitled to the forfeiture of the same.

ORDERED this 25 day of January, 2000.

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 95-CV-949-K (J)**
	)	
ONE HUNDRED TEN (110) ELECTRONIC AND/OR MECHANICAL GAMBLING DEVICES, MORE OR LESS, AND PROCEEDS,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff United States of America's motion for summary judgment. Plaintiff argues that it is entitled to the forfeiture of the remaining 17 gambling devices at issue in this case. Michael A. O'Brien, the only person having contested this forfeiture, has failed to respond to the Government's motion. Mr. O'Brien has not filed a claim in this forfeiture proceeding. The Government argues that it has established probable cause that these seventeen gambling machines were used for criminal activity. Because no claimant has established by a preponderance of the evidence that the machines were not connected to the requisite violation of the gambling law, the Government asserts that it is entitled to summary judgment.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact

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and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Applicable Law

The Government is seeking the forfeiture of the seventeen gambling devices pursuant to 18 U.S.C. § 1955. Once the Government shows probable cause that these devices are subject to forfeiture, the property will be forfeited unless a claimant can establish by a preponderance of the evidence a defense to the forfeiture. *See United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1496 (11th Cir. 1994); *see also United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1477 (10th Cir. 1996) (21 U.S.C. § 881). If no such rebuttal is made, the Government is entitled to forfeiture solely on the basis of its showing of probable cause. *See*

United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two and 43/100 Dollars ($149,442.43) in United States Currency, 965 F.2d 868, 876 (10th Cir. 1992).

Discussion

The Government has demonstrated probable cause that the seventeen gambling devices are subject to forfeiture. Any property used in violation of 18 U.S.C. § 1955 may be forfeited to the United States. *See* 18 U.S.C. § 1955(d). Section 1955 prohibits the operation of an illegal gambling business. *See id.* § 1955(a). The uncontroverted material facts demonstrate that the seventeen gambling devices were used in the illegal gambling business of Mr. O'Brien at The Blue House.

No claimant has established by a preponderance of the evidence any defense to the forfeiture or rebuttal of the Government's showing of probable cause. No one, including Mr. O'Brien, has responded to the Government's motion for summary judgment, nor has anyone presented any evidence to controvert the Government's strong evidence that the machines were used in connection with the operation of an illegal gambling business.

There being no issue of material of fact, the Government is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (# 59) is GRANTED and the following gambling devices seized from The Blue House, including the keys, operating manuals, repair books, repair or proceeds logs, and proceeds, are forfeited to the United States of America:

1. Native American Pull Tab, Serial Number 2116;
2. Native American Pull Tab, Serial Number unknown;
3. Native American Pull Tab, Serial Number 3122;
4. Native American Pull Tab, Serial Number 3077;
5. Wild Double Up, Serial Number 36886;
6. Omega Products Pick 8 Bingo VFM4F1, Serial Number 03211222440;
7. Omega Products Pick 8 Bingo, Serial Number 21910553154;
8. Native American Pull Tab, Serial Number 3132;
9. Native American Pull Tab, Serial Number unknown;
10. Native American Pull Tab, Serial Number 0569;
11. Native American Pull Tab, Serial Number 0781210211;
12. Native American Pull Tab, Serial Number 800625;
13. KENO Model 059, Serial Number 10271;
14. Electro-Sport Line, Bingo Pick 8 Model 055, Serial Number 005-1075;
15. Electro-Sport, Model 059, Serial Number 102235;
16. Electro-Sport, Bingo Pick 8 # 15, Serial Number M50056296;
17. Native American Pull Tab, Serial Number 3062.

ORDERED THIS 25 DAY OF JANUARY, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TINA M. MARTIN,
SSN: 448-66-9542,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 98-CV-963-E (M)

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed December 21, 1999. [Dkt. 12]. THE COURT ORDERS THAT THIS CASE BE REVERSED AND REMANDED for further proceedings, pursuant to Sentence 4 of Section 205(g) of the Social Security Act, 42 U.S.c. § 405(g) as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 19th day of January, 2000.

JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TINA M. MARTIN,
SSN: 448-66-9542,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 98-CV-963-E (M)

JUDGMENT

This Court entered an Order on the 19th day of January, 2000, adopting the Report and Recommendation of the United States Magistrate Judge to reverse and remand the captioned appeal.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant on this 20th day of January, 2000.

JAMES O. ELLISON
U.S. DISTRICT COURT SENIOR JUDGE

14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WALTER SCHERMERHORN,)
)
Plaintiff,)
)
vs.) No. 98-CV-637 B (J)
)
B. BAKER, et al.,)
)
Defendants.)

ORDER

Before the Court in this 42 U.S.C. § 1983 civil rights action are the following motions: motion to dismiss by Defendant Wexford Health Sources, Inc. (Docket #14); Plaintiff's motions for summary judgment (#s 17 and 18); and "motion to dismiss or in the alternative summary judgment" by Defendants Glanz and Baker (#24). Plaintiff is a state prisoner appearing in this matter *pro se* and *in forma pauperis*. For the reasons discussed below, the Court finds that Defendant Wexford's motion to dismiss should be granted, Plaintiff's motions for summary judgment should be denied, and Defendants Glanz and Baker's motion for summary judgment should be granted.

BACKGROUND

Plaintiff filed his Complaint on August 19, 1998, alleging that Defendants engaged in conduct violative of his constitutional rights. Plaintiff's claims arose while he was incarcerated at the Tulsa County Jail and include the following: excessive use of force, denial of medical care and treatment, failure to protect, censorship of outgoing legal mail, denial of access to courts.

By Order dated April 7, 1999, the Court dismissed several defendants, finding that Plaintiff's

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Complaint failed to state a claim as to those defendants. On May 3, 1999, the Court directed service of process as to Defendants Stanley Glanz, B. Baker, B. Greer and Wexford Health Sources, Inc. ("Wexford"). Upon service, officials responsible for the Tulsa County Jail were directed to prepare a Special Report to be submitted, along with Defendants' answers and/or dispositive motions, within sixty (60) days of service. The record shows that Defendants Glanz, Baker and Wexford were served on June 7, 1999. Service as to Defendant Greer was returned unexecuted on June 9, 1999.

Defendant Wexford filed its motion to dismiss for failure to state a claim upon which relief may be granted (#14) on July 14, 1999. Plaintiff did not file a response to the motion. However, Plaintiff did file motions for summary judgment (#s 17 and 18) on July 22, 1999, seeking entry of summary judgment based on Defendants' alleged failure to comply with deadlines imposed by the Court's May 3, 1999 Order. On August 19, 1999, after having been granted an extension of time, Defendants filed the Special Report (#23). On that same date, Defendants Glanz and Baker filed a motion to dismiss, or for summary judgment (#24). Plaintiff has not filed a response to Defendant Glanz and Baker's motion, in spite of being afforded a second opportunity to respond (see #27). The Court also specifically advised Plaintiff that should he fail either to respond or to show cause in writing for his failure to respond, the Court would, pursuant to the Local Rules of this Court, deem the matter confessed and enter the relief requested. See N.D. LR 7.1(C).

ANALYSIS

A. Wexford's motion to dismiss

In its motion to dismiss, Defendant Wexford asserts that Plaintiff's Complaint fails to state a claim upon which relief can be granted. For that reason, Wexford requests that the Court dismiss

Wexford from this action. Plaintiff has not responded to Wexford's allegations that the Complaint fails to state a claim as to Wexford.[1] Based on Plaintiff's failure to respond and pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems the matter confessed and dismisses Defendant Wexford from this action.

B. Plaintiff's motions for summary judgment

In his motions for summary judgment, Plaintiff seeks entry of judgment based on Defendants' alleged failure to comply with deadlines imposed by the Court's May 3, 1999 Order. In that Order, the Court directed preparation of a Special Report to be submitted along with Defendants' answers and/or dispositive motions *within sixty (60) days of service*. As stated above, Defendants were served on June 7, 1999. Thus, the deadline for submission of the Special Report and Defendants' responsive pleadings was August 6, 1999. Plaintiff's motions for summary judgment, filed July 22, 1999, or almost two (2) weeks *before* the deadline, are based on the erroneous assumption that the Special Report and responsive pleadings were to be filed within sixty (60) days of the entry of the Order directing service. Because the Special Report and responsive pleadings were filed in compliance with the Court's Orders of May 3, 1999 and July 30, 1999, the Court finds no basis for Plaintiff's motions for summary judgment and concludes the motions should be denied.

[1]The Court notes that in his motion for summary judgment (#18), Plaintiff requests that the Court deny Wexford's motion to dismiss based solely on Plaintiff's contention that Wexford had failed to comply with the Court's May 3, 1999 Order directing preparation and submission of a Special Report. Plaintiff's request for entry of summary judgment against Wexford does not, however, address Defendant Wexford's contention that the Complaint fails to state a claim as to Wexford.

C. Motion to dismiss, or for summary judgment filed by Defendants Glanz and Baker

On August 19, 1999, Defendants Glanz and Baker filed a motion to dismiss, or for summary judgment (#24) along with a thorough supporting brief (#25). On that same date, counsel for Defendants submitted a comprehensive Special Report (#23), compiled by officials responsible for the Tulsa County Jail. As stated above, Plaintiff has not responded to Defendants' motion even though the Court provided Plaintiff with a second opportunity to submit a response and warned Plaintiff that if he failed to respond, the Court would deem the matter confessed and enter the relief requested. The Court also notes that no mail from the Court to Plaintiff has been returned.

Having received no response from Plaintiff, the Court deems the matter confessed and finds that the motion for summary judgment filed by Defendants Glanz and Baker should be granted. Defendants' motion to dismiss has been rendered moot.

D. Defendant Greer should be dismissed based on lack of service

As noted above, on June 11, 1999, the Court received an unexecuted return of service as to Defendant B. Greer. The U.S. Marshall form was dated June 9, 1999 and stated that "B. Greer no longer works for TCSO and left no forwarding address. See attached copy of returned envelope." Nothing in the record indicates Plaintiff ever again attempted to effect proper service on Defendant Greer, even though more than seven (7) months have elapsed since the date of the unexecuted return of service. Due to Plaintiff's lack of diligence in pursuing his claims against Defendant Greer and having granted summary judgment in favor of Defendants Glanz and Baker, the Court finds Defendant Greer should be dismissed from this action without affording Plaintiff further opportunity to effect proper service on Defendant Greer.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The motion to dismiss (#14) filed by Defendant Wexford Health Sources, Inc., is **granted**.

2. Plaintiff's motions for summary judgment (#s 17 and 18) are **denied**.

3. The motion for summary judgment (#24-2) filed by Defendants Glanz and Baker is **granted**.

4. The motion to dismiss (#24-1) filed by Defendants Glanz and Baker is **moot**.

5. Defendant Greer is **dismissed** from this action based on lack of service.

6. This Order constitutes a final order terminating this action.

SO ORDERED THIS 24 day of Jan, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WALTER SCHERMERHORN,)
)
Plaintiff,)
)
vs.) No. 98-CV-637 B (J)
)
B. BAKER, et al.,)
)
Defendants.)

JUDGMENT

This matter came before the Court upon Defendants' motions to dismiss and/or for summary judgment. The Court previously dismissed Defendants Tulsa County Sheriff's Department, Tulsa City/County Jail, County of Tulsa, City of Tulsa, Tulsa City Excise Board and Tulsa County Excise Board. The Court has now dismissed Defendant B. Greer based on Plaintiff's failure to effect service and Defendant Wexford Health Sources, Inc., having granted Defendant Wexford Health Sources, Inc.'s motion to dismiss for failure to state a claim upon which relief may be granted. The Court granted summary judgment on all claims against the remaining Defendants.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants Stanley Glanz and B. Baker and against Plaintiff and that Plaintiff take nothing by his claims.

SO ORDERED THIS 24th day of Jan, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 24 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEFF EVERETT and CHANDRA EVERETT, husband and wife,	)	
Plaintiffs,	)	
vs.	)	**Case No.: 99CV025 E (E)**
NATIONSBANK, N.A. a foreign national bank association,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE JAN 25 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiffs, Jeff and Chandra Everett, and Defendant, NationsBank, hereby stipulate that the above styled cause shall be dismissed with prejudice, and Plaintiffs agree that all rights, causes of action, claims or other proceedings which they may have, known and unknown, asserted or unasserted, against NationsBank are dismissed. The Plaintiffs stipulate that all claims or causes of action which they may have against NationsBank as well as against any and all successors, or agents of NationsBank is released. Such Dismissal is with prejudice.

Respectfully submitted,

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Attorney for Plaintiff

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Attorneys for Defendant

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CJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL GRAHAM MCGEE,

Petitioner,

vs.

STEPHEN KAISER, Warden; and JAMES SAFFLE, Director, Oklahoma Department of Corrections,

Respondents.

Case No. 99-CV-0154-C (M)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #9) entered on September 23, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that Respondent's motion to dismiss (#6) be granted and the petition for writ of habeas corpus (#1) be dismissed as barred by the statute of limitations imposed by 28 U.S.C. § 2244(d). On October 7, 1999, Petitioner, appearing in this matter *pro se*, filed his objection to the Report (#10).

In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

In his Report, the Magistrate Judge concludes that Petitioner's challenged state conviction, entered in Tulsa County District Court, Case No. CRF-92-578, became final prior to the April 24,

1996 enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). As a result, the one-year grace period applies to this case and Petitioner had until April 23, 1997 to file a timely federal habeas corpus petition. See Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). However, the Magistrate Judge further found that because the grace period expired before Petitioner sought post-conviction relief, the limitation period was not tolled pursuant to § 2244(d)(2). Also, the Magistrate Judge found no basis for equitable tolling in this case. As a result, because Petitioner did not file his petition until February 25, 1999, the Magistrate Judge concluded that the petition was untimely and subject to dismissal.

Petitioner objects to the Magistrate Judge's conclusions, requesting that he be allowed to proceed with his petition because he has had to "rely on the use of fellow inmates and their limited legal knowledge for help concerning this case" (#10 at 1) and alleging that the "Antiterrorism Act is unconstitutional by denying petitioner the right to file a writ of habeas corpus" in violation of the suspension clause of the Constitution (#10 at 2).

DISCUSSION

After reviewing the record, the Report, and Petitioner's objections to the Report, the Court agrees with the Magistrate Judge's conclusions and finds that the instant petition was not timely filed. The Court finds no basis for equitable tolling of the limitations period based on Petitioner's assertion that he had to rely on fellow inmates due to limited access to legal materials. It is well established, as noted by the Magistrate Judge in the Report, that neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991) (cause and prejudice standard applies to *pro se*

prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992) (actual knowledge of legal issues not required by *pro se* petitioner). Furthermore, because there is no legal right to counsel in collateral proceedings, see Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), lack of legal assistance cannot constitute sufficient cause for a failure to timely file a habeas petition. Williams v. Lytle, No. 98-2197, 1999 WL 397394, *3 (10th Cir. June 17, 1999) (unpublished opinion).

The Court also finds no merit to Petitioner's argument that application of the AEDPA to this case is unconstitutional because it violates the Suspension Clause, U.S. Const., art. I, § 9, clause 2. The Tenth Circuit Court of Appeals has addressed the constitutionality of the AEDPA's limitations period and has held that, absent extraordinary circumstances not present in this case, the one-year limitation on filing a first habeas petition does not violate the Constitution's Suspension Clause. Miller v. Marr, 141 F.3d 976, 977-78 (10th Cir.), *cert. denied*, -- U.S. --, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998). Therefore, the Court rejects Petitioner's argument that application of the AEDPA to this case violates the Suspension Clause.

The Court concludes Petitioner has failed to demonstrate both that he pursued his habeas claims diligently and the existence of extraordinary circumstances justifying equitable tolling. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Therefore, the Court agrees with the Magistrate Judge's conclusion that Petitioner is not entitled to equitable tolling in this case. The Report should be adopted and affirmed and the petition for writ of habeas corpus should be dismissed with prejudice as barred by the statute of limitations.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. Respondent's motion to dismiss should be granted and Petitioner's petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#9) is **adopted and affirmed.**

2. Respondent's motion to dismiss time barred petition (#6) is **granted.**

3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1) is **dismissed with prejudice.**

SO ORDERED THIS 27th day of January, 2000.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL GRAHAM MCGEE,

Petitioner,

vs.

STEPHEN KAISER, Warden; and
JAMES SAFFLE, Director,
Oklahoma Department of Corrections,

Respondents.

Case No. 99-CV-0154-C (M)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 24th day of January, 2000.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEWIS AARON COOK,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 90-C-210-B
	)	
MARK MCCRORY,	)	
	)	
Appellee.	)	

ORDER

Appellant Lewis Aaron Cook ("Cook") appeals the judgment entered by Magistrate Judge John L. Wagner on June 9, 1993 pursuant to a jury verdict in favor of defendant Mark McCrory ("McCrory") on Cook's claim under 42 U.S.C. §1983. This Court's appellate jurisdiction arises pursuant to 28 U.S.C. §636(c)(4)[1] and Fed.R.App.P. 3.1 and Local Rule 73.2.

Cook filed this §1983 action on March 14, 1990 alleging McCrory violated his Fourth Amendment rights by using excessive force during Cook's arrest for drug-related charges on July 25, 1989 when McCrory beat him repeatedly about the head and face with a large metal flashlight, choked him for over four minutes, violently forced his arms behind him to be handcuffed and kicked him in the chest By consent of the parties, a jury trial was held before Magistrate Judge John L. Wagner on June 7th through 8th, 1993. On June 8, 1993, the jury returned a verdict against Cook and in favor of McCrory, and judgment was entered accordingly

[1] Section 636(c) of Title 28 was amended on October 19, 1996 to limit an appeal of the judgment of the magistrate to the appropriate court of appeals. Federal Rule of Civil Procedure 73(c) was amended, effective December 1, 1997, to reflect the statutory change.

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on June 9, 1993. Cook filed a notice of appeal on June 21, 1993. Due to an error in the Office of the Clerk for the United States District Court for the Northern District ("Court Clerk"), the appeal was directed to the Tenth Circuit. On October 19, 1993, the Court Clerk notified the Clerk of the Tenth Circuit Court of Appeals that the record was erroneously sent to the Tenth Circuit as Cook's appeal of the judgment and denial of his motion were to the district court and not to the circuit court. On December 22, 1994, the Tenth Circuit dismissed the appeal based on the parties' consent to appeal to the district court with any appeal to the circuit court by way of petition only, pursuant to 28 U.S.C. §636(c)(4) and Fed.R.App.P. 3.1 and Local Rule 73.2. A certified copy of the Tenth Circuit Order and Judgment dismissing the appeal was filed on January 17, 1995. The appeal, however, was not brought to this Court's attention until the Spring of 1999, whereupon the Court directed the parties to file their appellate briefs. As the briefing is now complete, the appeal is before the Court for decision.

As an initial matter, Cook has moved for an evidentiary hearing, as well as appointed counsel for his appeal (Docket Nos. 83 and 90). The Court denies the motions. Cook was granted an "evidentiary hearing" when his excessive force claim was tried to a jury in June 1993. It is the judgment entered pursuant to the jury's verdict in that trial which is now on appeal before this Court. Only if the Court reverses and remands this case is Cook entitled to any further "evidentiary hearing."[2] Further, the Court concludes Cook is not entitled to the appointment of counsel in his appeal of this civil matter. *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995); *cf. 10th Cir. Add. II (Plan for Appointment of Counsel in Special Civil Appeals)*. Cook was competently represented by appointed counsel throughout discovery and

[2] Apparently, Cook mistakenly believes he is entitled to a *Franks* hearing on appeal based on his allegations regarding the search warrant issued in his criminal prosecution. *See Franks v. Delaware*, 438 U.S. 154 (1978).

trial. As the Court granted Cook's request for a transcript of the trial, the complete record is before the Court on appeal. *See April 4, 1999 Order (Docket No. 80).* In addition, the factual and legal issues in this appeal are not complex; nor does their resolution have wide impact.

Cook raises the following issues on appeal: (1) McCrory was not issued a search warrant by Judge Harris; (2) the affidavit in support of the warrant failed to establish the alleged confidential informant was a credible or reliable person; (3) the warrant for nighttime service was not legal in that it failed to set forth facts that property would be lost, stolen or destroyed; (4) the affidavit lacked "exigent circumstances" to provide for nighttime service; (5) witnesses Phyllis J. Davis, R.N. ("Davis") and Stewart Hinkle, D.O. gave misleading testimony and committed perjury; (6) references to Cook's prior convictions by counsel before the jury were improper; and (7) Cook's trial counsel provided ineffective assistance in the prosecution of his §1983 claim.

As Cook did not raise issues (1) through (4) at trial, the Court will not consider them for the first time on appeal.[3] *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999). Cook, however, also argues in issue (7) that his counsel's failure to raise these alleged Fourth Amendment violations in his civil action establishes counsel's ineffective assistance in the prosecution of Cook's §1983 claim. Cook apparently "confuses this civil case with a Sixth Amendment based claim for the re-trial of a criminal case." *MacCuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988). Unlike his claim for ineffective assistance of counsel in his §2255 motion, in a civil case

[3] Cook was certainly aware of these issues at the time of the civil proceedings as he had made the identical allegations in his motion to vacate sentence pursuant to 28 U.S.C. §2255 and in his appeal of the trial court's denial of his §2255 motion. *See United States v. Cook*, 997 F.2d 1312, 1316-18 (10th Cir. 1993)(remanding for determination of whether defendant was denied effective assistance of counsel at trial and on direct appeal). Further, the Court notes Cook raised the issue of the sufficiency of the affidavit supporting the search warrant in the direct appeal of his criminal conviction and the Tenth Circuit concluded the state court judge had probable cause to issue the warrant based on the totality of the circumstances. *United States v. Cook*, 949 F.2d 289, 292-93 (10th Cir. 1991).

such as this, such a claim will not relieve a party from an adverse judgment. "'[T]he right to counsel in a civil case is not a matter of constitutional right under the Sixth Amendment.'" *Id.* (*quoting Cullins v. Crouse*, 348 F.2d 887, 889 (10th Cir. 1965)). The appropriate remedy for allegedly incompetent representation is a malpractice suit against [the] trial attorney and not a new trial.[4] *Id.* at 735-36.

Regarding issue (5), Cook's allegation that Davis and Dr. Hinkle gave misleading testimony, the Court has reviewed the testimony of Davis and Dr. Hinkle, including pages 355-84 and 390 cited by Cook, as well as the exhibits attached to his briefs, and concludes there is no basis for finding reversible error. Upon review of Cook's medical records, Dr. Hinkle offered his expert medical opinion that Cook's left shoulder condition was due to arthritis and an extensive pre-arrest history of injuries and not any trauma to his neck, shoulder and arm allegedly caused by McCrory during Cook's arrest on July 25, 1989. Davis, the nurse who conducted the medical screening of Cook on the night of his arrest, testified she examined Cook and found no bruising, swelling, cuts or other evidence of trauma. Both Dr. Hinkle and Davis were adequately cross-examined by Cook's counsel as to their expertise and the basis for their opinions.

Finally, Cook argues he should be granted a new trial based on the statement and

---

[4]Although not before the Court, the Court notes its agreement with the trial judge's assessment of Cook's counsel's representation:

> At least, in trying to get this case ready for trial, I sincerely doubt we would have been able to present as effective a case or have presented it as well, without the assistance of counsel who are serving at the instance of the Court without compensation.
>
> It is clear to me, over the course of this trial, a great deal of work and preparation went into the presentation of this case and I do appreciate, again, both the professionalism and frankly the vigor of the representation of Mr. Cook here.
>
> It's very difficult sometimes for lawyers to work without pay and I must say that I haven't seen any lawyers try a case as well or as vigorously, even with pay. So I do appreciate it, Mr. Fitzpatrick and Mr. Luthey, your assistance in this regard.

Transcript, p. 430.

questions of defendant's counsel concerning Cook's prior convictions. Cook specifically cites defendant's counsel Mr. Newbold's opening statement: "Mr. Cook was convicted of selling crack cocaine in this neighborhood," *Transcript, p. 51*; and the following cross-examination of Cook by defendant's counsel Mr. Simmons:

> MR. SIMMONS: Your Honor, at this time I propose to ask the witness if within the last ten years he has been convicted or released from prison following a conviction of a crime which was a felony for purpose of impeachment under Rule 609.
> MR. LUTHEY: Your Honor, I assume that the question will be limited just to that and not what the crime is.
> MR. SIMMONS: I will limit it to that, Your Honor.
> THE COURT: You may proceed.
> (End of bench conference.)
> THE COURT: Mr. Simmons, you may proceed.
> Q. (By Mr. Simmons) Mr. Cook, have you within the last ten years, been convicted or released from confinement following a conviction for a crime which was a felony?
> A. Do you want me to list them, what?
> Q. Just could you answer yes, then?
> A. Uh-huh, the answer is yes.
> Q. Can I ask you how many within the last ten years that you've either been convicted of or released from confinement following a conviction of?
> A. Following the conviction of means what? That it was a legal conviction or I was illegally imprisoned or what do you mean?
> Q. Convicted according to the courts?
> A. Well, according to the courts, I shouldn't have even been in prison most of them times that you're thinking about. They was vacated.
> Q. Would you tell us which times within the last ten years you've been convicted of a felony?
> A. Once.
> Q. Pardon me?
> A. Once.
> Q. How many times –
> A. Once. You're talking about one state conviction other than this one?
> Q. Any felony conviction.
> A. It would be once, this conviction that I'm serving right now.
> Q. How many times have you been released from confinement within the last ten years for a crimes that was a felony that you were convicted of?
> A. Once.
> Q. And that's separate from the one you're doing now, right?

A. Yeah.
MR. SIMMONS: May we approach again, Your Honor?
(Whereupon counsel approached the bench and the following proceedings were had out of the hearing of the jury:)
MR. SIMMONS: Your Honor, I've failed to indicate that at this time I would like to inquire as to whether he has been convicted of a crime involving a fraud or dishonesty within the last ten years. I can advise the Court that I have information of his arrests. I do not have the information of what he's been convicted of and I cannot advise the Court what the underlying factual basis of the convictions were.

I would ask if the question is not permitted, that the Court perhaps make an inquiry as to the underlying factual basis to determine whether it would be a proper question.
MR. LUTHEY: I'll object to this because counsel has not – I will object to the fact that counsel has not gone into the records to determine what judgment and sentence was imposed. This is not this witness's problem. We don't seem to have a good faith basis for the question. An arrest is certainly not a conviction.
MR. SIMMONS: Some of his arrests, at least one of his arrests, I know, is outside this jurisdiction. I guess I could have hired someone to go do that. I did not do it. I would just simply say that if the witness answers no, then I'm stuck.
THE COURT: I would agree with that. You may go ahead and ask the question.
MR. LUTHEY: Note my objection.
THE COURT: Objection noted.
(END OF BENCH CONFERENCE.)
THE COURT: You may proceed.
MR. SIMMONS: Thank you, Your Honor.
Q. (By Mr. Simmons) Mr. Cook, would you advise us whether, within the last ten years, you've been convicted of a crime which involved fraud or dishonesty, regardless of the punishment?
A. No, sir, I never have.

Transcript, pp. 82-84. In the first instance, Cook's counsel objected and moved for a mistrial arguing the statement violated the Magistrate Judge's in limine order. The Magistrate Judge overruled the motion. In the second instance, Cook's counsel objected and Magistrate Judge overruled the objection to the Fed.R.Evid. 609 line of questioning, as set forth above.

The Court reviews the Magistrate Judge's denial of Cook's motion for mistrial and admission of the Rule 609 cross-examination under an abuse of discretion standard. *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 769 (10th Cir. 1997). Cook had moved to exclude all evidence

of his criminal history as well as McCrory's knowledge of Cook's criminal history under Fed.R.Evid. 403 (Docket No. 51). In response, McCrory argued Cook's past convictions were admissible to show the "facts and circumstances" confronting him at the time of the arrest to establish his actions were objectively reasonable (Docket No. 56). The only record of the Magistrate Judge's in limine order is in the Civil Minute Sheet, dated 6-7-93, which states plaintiff's motion is granted to the extent that the portions of plaintiff's criminal record not known at the time of his arrest are excluded. Whether or not the Magistrate Judge's in limine Order excluded McCrory's counsel's statement, the Court cannot say the trial judge abused his discretion in denying the motion for mistrial.[5] Further, McCrory's counsel's cross-examination of Cook was proper under Fed.R.Evid. 609. However, even if it were not, the cross-examination of Cook, if it accomplished anything, inured to Cook's benefit, not prejudice. Thus, the Court finds no abuse of discretion in allowing the Rule 609 cross-examination.

The judgment entered in this case is AFFIRMED.

IT IS SO ORDERED, this 24th day of January, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[5]Neither is the Court persuaded the judgment should be vacated based on the inaccuracy of McCrory's counsel's statement. Although Cook was not convicted of selling crack cocaine, he was convicted of Maintaining a Place for the Purpose of Distributing crack cocaine, in violation of 21 U.S.C. §856(a).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARRIE L. CRAINE,
SSN: 372-82-3691,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 98-CV-0240-EA

ORDER

On October 6, 1999, this Court reversed and remanded the Commissioner's decision for further proceedings, thereby making plaintiff the prevailing party. Plaintiff has submitted an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), seeking an award in the amount of $3,456.25 for attorney fees for all work done before the district court and $158.54 for "court costs and filing fees." Defendant does not object to the amount requested for attorney fees, but defendant objects to plaintiff's request for costs because plaintiff did not file a bill of costs, a brief in support, and a verification of the bill of costs. 28 U.S.C. §§ 1920, 1924; N.D. L.R. 54.1. Instead, plaintiff merely included such costs as an expense in his EAJA request. Further, defendant specifically objects to plaintiff's request for the "mailing expenses" reflected in plaintiff's request for costs.

Defendant argues that costs are not recoverable because plaintiff has failed to comply with the established procedural requirements for seeking an award of costs. See White v. Apfel, Civ. 97-877-A (W.D. Okla. February 18, 1998) (unpublished decision). Although EAJA authorizes costs, it does not specify a time limit or procedure for seeking such an award. 28 U.S.C. § 2412(a). It does

specify a time limit and procedure for seeking "fees and other expenses," which are defined as including "the reasonable expenses of expert witnesses, the reasonable costs of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparations of the party's case, and reasonable attorney fees." Id. § 2412(d)((2)(A). A party has 30 days from the date of final judgment in which to submit to the court an application for fees and other expenses which includes the amount sought and an itemized statement. Id. § 2412(d)(1)(B).

Costs are distinguishable from "other expenses" under EAJA. Under 28 U.S.C. § 1920, a party seeking costs must file a bill of costs in the case; under id. § 1924, the bill of costs must contain an affidavit verifying the bill of costs; under N.D. L.R. 54.1(A), the party must submit the bill of costs, a brief in support as described in the rule, and the verification within 14 days after entry of judgment. Failure to comply with the local rule constitutes waiver of claim or objection. N.D. L.R. 54.1(F). Under these authorities, defendant argues, plaintiff has waived its claim for costs.

However, the Court recognizes the long-standing practice in this district whereby prevailing parties in Social Security disability appeals have included their requests for costs in their EAJA applications for fees and other expenses, without objection. It would be inequitable and inefficient to require the prevailing parties in this type of case to submit a separate bill of costs within 14 days, while EAJA allows 30 days for an application for fees and expenses. The costs requested in these cases are typically $8.54 (service costs only) or $158.54 (filing fees and service costs). A separate hearing before the Court Clerk for such a small amount would cost more than the costs requested. Additionally, it would be unfair to require claimant in this matter to be the "sacrificial lamb" and bear the consequences of a requirement that suddenly changes the long-standing practice. Accordingly, the Court chooses to exercise its discretion under N.D. L.R. 1.1(e) and waive the

requirements of its local rules as they apply to the recovery of costs in Social Security disability appeals because "the administration of justice requires such waiver." Plaintiff is entitled to an award of costs.

In awarding costs, this Court is not persuaded by defendant's argument to reject "postage fees" which are the costs of certified mail. The Court has previously ruled that such costs are recoverable where those costs are for service of process. See Perkins v. Apfel, No. 98-CV-0380-EA (N.D. Okla. Dec. 28, 1999) (unpublished decision). As set forth in Perkins, service of process is not only necessary to litigation, it is required. Fed. R. Civ. P. 4. The cost for service of process would be recoverable under 28 U.S.C. §1920(1) if defendants were served by the United States Marshal, and costs could be higher if plaintiff elected that method of service. Service by mail better serves the interests of economy and efficiency; in fact, process upon the United States, its agencies, corporations, or officers *must* be made, in part, by registered or certified mail. Fed. R. Civ. P. 4(i). Fees for service of process should be recoverable, even if certified mail costs necessarily include postage.

Weakley v. Bowen, 803 F.2d 575, 588 (10th Cir. 1986), does not require a contrary result. That decision, as well as the cases it references for the proposition that postage fees are not recoverable under EAJA, does not indicate that the postage fees at issue there were expended to serve defendants, and this Court would agree that plaintiff cannot recover for postage fees on letters to clients, documents to opposing counsel, or the like. However, it is appropriate, as recognized by the Eastern District of Oklahoma in Randolph v. Apfel, Case No. 98-248-S (E.D. Okla. June 10, 1999) (unpublished decision), to award costs for service of process effected by registered or certified mail.

IT IS THEREFORE ORDERED that plaintiff be awarded attorney fees in the amount of $3,456.25 and costs of $158.54 for a total award of $3,614.79 under EAJA. Plaintiff's request for an additional $399.00 for preparation of a reply brief is denied. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley, 803 F.2d at 580. This action is hereby dismissed.

It is so ORDERED this 25th day of January, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELMER B. GARRETT; DELMER GENE GARRETT; and RUTH GARRETT'S ESTATE,	)	
Plaintiffs,	)	
v.	)	**No. 99-CV-514-K (E)**
CARLOTTA GORDON,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE JAN 24 2000

ORDER

Before the Court is Defendant's motion to dismiss under Fed. R. Civ. Pro. 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff has failed to respond to Defendant's motion to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed Defendant's motion to dismiss, and, through an independent inquiry, has determined that it lacks subject matter jurisdiction over Plaintiffs' claims.

For the reasons stated herein, Defendant's Motion to Dismiss Amended Complaint (# 4) is GRANTED and the above-captioned case is DISMISSED.

ORDERED this 20 day of January, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL LAMONT WARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-0795-K(E)**
	)	
TULSA BOYS' HOME, INC.,	)	
	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by and between the undersigned attorneys for plaintiff and defendant, that the above-entitled action is dismissed as follows. Plaintiff's claims relating to racial discrimination only are dismissed with prejudice. All other causes of action are dismissed without prejudice as to refiling. Each party is to bear its own costs.

Dated this 21st day of January, 2000.

Ronald D. Wood, OBA #9848
Kevin S. Hoskins, OBA #17064
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100 West Fifth Street
Tulsa, Oklahoma 74103-4217

Attorneys for Defendant
Tulsa Boys Home

1-19-00

FILED

JAN 21 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 99CV0848K(M)**
	)	
MARVIN G. HUBBARD, JR.,	)	
	)	ENTERED ON DOCKET
Defendant.	)	DATE JAN 24 2000

AGREED JUDGMENT

This matter comes on for consideration this 20th day of January, 2000, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Marvin G. Hubbard, Jr., appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Marvin G. Hubbard, Jr., acknowledged receipt of Summons and Complaint on January 3, 2000. The Defendant has not filed an Answer but in lieu thereof has agreed that Marvin G. Hubbard, Jr. is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Marvin G. Hubbard, Jr. in the principal amount of $1,919.24 and $2,735.20, plus accrued interest in the amount of $348.65 and $632.96, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $1,919.24 and $2,735.20, plus accrued interest in the amount of $348.65 and $632.96, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 5.997 until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PHIL PINNELL
Assistant United States Attorney

MARVIN G. HUBBARD, JR.

PEP/jmo

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID EUGENE WILLIAMS,

Petitioner,

vs.

HOWARD RAY,

Respondent.

Case No. 97-CV-565-BU

JUDGMENT

In accord with the Order denying Petitioner's application for a writ of habeas corpus, the Court hereby **enters judgment** in favor of Respondent and against the Petitioner.

SO ORDERED THIS 21st day of January, 2000.

Michael Burrage
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM B. BLEW, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM B. BLEW, JR., DECEASED	)	
Plaintiff.	)	Case No. 99CV0174B (E)
v.	)	
UNITED STATES OF AMERICA	)	
Defendant	)	

STIPULATION FOR DISMISSAL AND ENTRY OF JUDGMENT

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

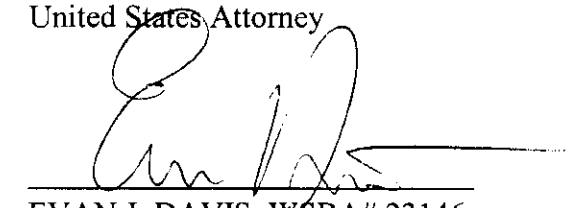
SO ORDERED:

Dated this 24th day of January, 2000.

/s/ James O. Ellison
THOMAS R. BRETT
Senior Judge, United States District Court

Approved as to form and
content:

~~B. TODD JONES~~
United States Attorney



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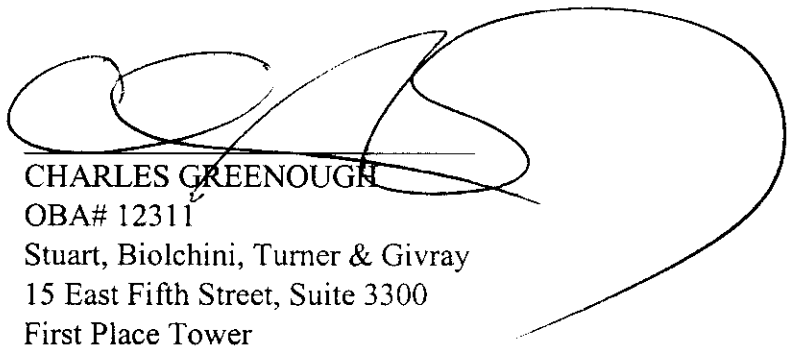

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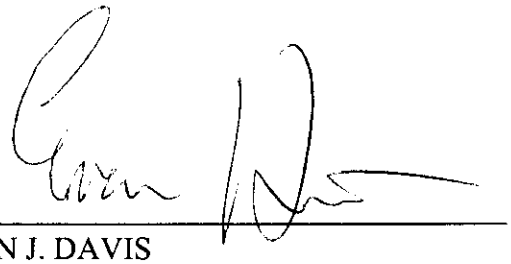
Attorney for Plaintiff

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the **STIPULATION FOR DISMISSAL AND ENTRY OF JUDGMENT** has been made upon the following by depositing a copy in the United States mail, postage prepaid, this **18th** day of January 2000:

Charles Greenough
Stuart, Biolchini, Turner & Givray
15 East Fifth Street, Suite 3300
First Place Tower
Tulsa, OK 74103



EVAN J. DAVIS
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
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LRH/jo
1/7/00

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

Plaintiff,

vs.

DANIKA FISHER, a minor child, by and through KELLY HARRIS, her Guardian Ad Litem, DAN FISHER, surviving natural father of Angie Fisher, deceased, and SUSAN BEAR, surviving natural mother of Angie Fisher, deceased, and HINDERLITER-WOODARD FUNERAL HOME, INC., a corporation,

Defendant.

AND

DANIKA FISHER, a minor child, by KELLY HARRIS, her guardian ad litem,

Defendant and Third-Party Plaintiff,

vs.

DEBRA LEE FORBES and the Estate of DANIEL CLYDE BENNETT, deceased,

Third-Party Defendants.

Case No.: 99 CV 1002BU(M)

ORDER

NOW on this _____ day of January, 2000, upon the Stipulation of American Standard Insurance Company of Wisconsin, Danika Fisher, a minor child appearing through her guardian ad litem, Kelly Harris, and Susan Bear, the same being all parties who have made appearances herein, this Court orders the remand of this cause to the District Court of Delaware County, State of Oklahoma.

It has further been stipulated to the Court that the parties have agreed upon the appropriate reimbursement of reasonable costs and fees to be paid by petitioner, American Standard Insurance Company of Wisconsin.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that upon the stipulation of the parties this cause is hereby remanded to the District Court of Delaware County, State of Oklahoma.

s/ MICHAEL BURRAGE

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 24 2000

FILED
JAN 21 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	
Plaintiff,	)	
v.	)	
JAMES H. BURKHALTER, et al.,	)	
Defendants.	)	CIVIL ACTION NO. 99-CV-1042-H (M)

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 20TH day of JANUARY, 2000.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CDM:css

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

G.A. ASBERY, JR.,

Plaintiff,

vs.

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Defendant.

Case No. 99-CV-1099-BU

ORDER

On December 21, 1999, Defendant, Hartford Underwriters Insurance Company, removed this action from the District Court of Delaware County, Oklahoma, pursuant to 28 U.S.C. § 1446. In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "'underlying facts supporting [the] assertion that the amount in controversy exceeds [$75,000].'" Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992)(emphasis in original). Furthermore, there is a presumption against removal jurisdiction.

Id.

In the instant case, the Petition filed by Plaintiff, G.A. Asbery, Jr., does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely alleges:

> Plaintiff prays for judgment against the Defendant, Hartford Underwriters Insurance Company, in an amount in excess of $10,000.00 for compensatory damages and in an amount in excess of $10,000.00 for punitive damages, costs, attorney fees and such other relief as the Court deems just and equitable.

As a result, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant has offered no facts whatsoever to support the Court's exercise of diversity jurisdiction. Defendant has simply alleged in the Notice of Removal that "Plaintiff seeks recovery of an amount which exceeds $75,000.00, exclusive of costs and interest." This allegation does not, in the Court's view, satisfy Defendant's burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds $75,000.

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Court finds that it lacks subject matter jurisdiction and therefore, this action shall be remanded to state court.

Accordingly, this action is **REMANDED** to the District Court of Delaware County, Oklahoma and the case management conference currently scheduled for March 3, 2000 at 1:15 p.m. is **STRICKEN**. The Clerk of the Court is directed to mail a certified copy of this

order to the Clerk of the District Court of Delaware County, Oklahoma.

ENTERED this 20th day of January, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION (AMFA); AMFA/AA ORGANIZING COMMITTEE; and PATRICK CARROLL, DENNIS K. HAYES, RICHARD K. JACKSON, KRIS KRISTJANSSON, DON RODGERS, TROY SOMMER, and DAVID STEWART, as individuals,

PLAINTIFFS,

vs.

AMERICAN AIRLINES, INC.,

DEFENDANT.

CASE NO. 99-CV-632-K (M)

REPORT AND RECOMMENDATION

The Motion to Dismiss of defendant American Airlines, Inc. [Dkt. 7] and the Motion To Dismiss the Amended Complaint and Brief in Support. [Dkt. 12-1] have been referred to the undersigned United States Magistrate Judge for report and recommendation.

By its motion, defendant moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6) based upon the plaintiffs' lack of standing and failure to state a claim upon which relief may be granted.

In the Amended, Verified Complaint for Injunctive and Declaratory Relief, plaintiffs seek relief for alleged violations by the defendant of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-181. The RLA gives employees the right to organize and bargain collectively through representatives of their own choosing without interference

by the carrier.

Plaintiff, Aircraft Mechanics Fraternal Association ("AMFA"), is a labor organization which is seking but has not been certified by the National Mediation Board as the exclusive collective bargaining agent of the craft or class of mechanics and related employees at defendant, American Airlines, Inc.

Plaintiff AMFA/AA Organizing Committee is an unincorporated association operating to promote the certification of AMFA as the certified collective bargaining representative for the craft or class of mechanics and related employees at Defendant American Airlines, Inc.

Patrick Carroll, Richard K. Jackson, Dennis K. Hayes, Kris Kristjanson, Don Rodgers, Troy Sommer and David Stewart are natural persons working within the craft or class of mechanics and related employees at defendant, American Airlines, Inc.'s Tulsa base. These individuals are actively engaged in promoting the efforts of the AMFA/AA Organizing Committee.

Standard for Ruling on Motion To Dismiss

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b)(6), the court must accept all factual allegations in the light most favorable to the plaintiff. See *Ash Creek Mining Company v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992); *Jaghory v. New York State Dept. of Education*, 131 F.3d 326, 329 (2nd Cir. 1997). Under these rules, the court may not dismiss a complaint unless "it appears beyond doubt, even when the complaint is

liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *id.* (quoting *Hoover v. Ronwin*, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 590 (1984). *See also Ash Creek Mining Company, supra.*, at 870. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3rd Cir.), *cert. denied*, 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed. 2d 1007 (1991). *See also Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed 80 (1957) (dismissal should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

Plaintiffs' AMFA and AMFA/AA Organizing Committee

Citing *Adams v. Federal Express*, 547 F.2d 319 (6th Cir. 1976) *cert. denied*, 431 U.S. 915 (1977), defendant argues that the AMFA and the AMFA/AA Organizing Committee lack standing under the RLA to bring claims on behalf of any of American's employees because they are not certified by the National Mediation Board to represent any American's employees. In *Adams*, the court held: "We find no express provision in the Railway Labor Act conferring a right of action on an uncertified Union to file suit on behalf of employees it seeks to represent...we conclude that the Railway Labor Act confers no implied right of action upon an uncertified union to maintain a suit on behalf of employees it seeks to represent." *Adams*, 547 F.2d at 321-322. *See also: Grosschmidt v. Chautauqua Airlines, Inc.*, 122 L.R.R.M. 3254 (N.D. Ohio 1986).

Plaintiffs have not cited any authority which grants standing to an uncertified

union or an uncertified association of employees to assert claims under the RLA. Plaintiffs citation to cases concerning constitutional standing, or associational standing in general, are unpersuasive. Under the RLA and the authorities cited above, the AMFA and AMFA/AA Organizing Committee have no express or implied right of action under the RLA. The undersigned, therefore, recommends that the court grant defendant's motion and dismiss plaintiff, AMFA, and plaintiff, AMFA/AA Organizing Committee, with prejudice.

Individual Plaintiffs

Defendant acknowledges that an individual plaintiff has standing to assert his/her personal rights under the RLA. However, defendant argues that "The RLA provides for limited and exceptional judicial intervention to be exercised only to prevent a party from engaging in conduct which undermines the fundamental provisions of the RLA." Defendant further argues that this limited and exceptional judicial intervention should only be exercised in cases where an individual plaintiff is terminated for union activities. While defendant has cited cases where courts have exercised jurisdiction when plaintiffs were terminated for union organizing activities, the defendant has not cited any case holding that a court should only exercise its jurisdiction in cases where the plaintiff has been terminated or other adverse employment action has been taken as the result of the plaintiff's union organizing activities. Certainly, defendant has not established that the individual plaintiffs should have their cases dismissed at the pleading stage. *Belton v. Air Atlanta, Inc.*, 647 F. Supp. 28 (N.D. GA 1986).

While the court is cautious of involving itself unnecessarily in the day-to-day

conduct of the relationship between the defendant and its employees, *Adams*, 547 F.2d at 321, the court also recognized:

> The right of employees to organize, free from interference and coercion by their employer, is rooted in the freedom of citizens of a free society to organize for lawful purposes. See *Delaware & Hudson Railway Co. v. United Transportation Union*, 146 U.S. App. D.C. 142, 450 F.2d 603 (1971). In cases such as the present one, a district court must exercise great care to prevent the employees' right to organize from becoming illusory." *Id.*, p. 323.

Based upon the language of the statute and the authorities construing the same, the court finds that it does have jurisdiction to hear the claims of the individual plaintiffs and further, that the individual plaintiffs have set forth sufficient facts and allegations in the amended complaint to survive defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. The court, therefore, recommends that defendant's motion to dismiss with regard to the individual plaintiffs be denied.

Conclusion

The undersigned respectfully RECOMMENDS that the court GRANT defendant's motion to dismiss with regard to plaintiffs, American Aircraft Mechanics Fraternal Association (AMFA) and AMFA/AA Organizing Committee. The undersigned further RECOMMENDS that the court DENY defendant's motion to dismiss with regard to the individual plaintiffs.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the District Court

for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison,* 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Submitted this 19th day of January, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 21 Day of Jan., 2000.